



UNIVERSITY OF  
LINCOLN

**Representative Actions and Restorative Justice:  
*A Report for the Department for Business  
Enterprise and Regulatory Reform (BERR) –  
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**Att. Mr.G. Horsington**

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## CONTENTS

<b>1.</b>	<b><u>INTRODUCTION</u></b>	<b>6</b>
1.1	Overview	
1.2	Research Outline	
<b>2.</b>	<b><u>EXECUTIVE SUMMARY</u></b>	<b>10</b>
<b>3.</b>	<b><u>METHODOLOGY</u></b>	<b>16</b>
3.1	Data Collection and Research Stages	
3.2	Response to the research	
3.3	Nature of the responses	
<b>4.</b>	<b><u>CONSUMER GROUP/REPRESENTATIVE ACTIONS</u></b>	<b>22</b>
4.1	Sanctions	
4.2	Civil Action	
4.3	Lessons from Competition Damage Cases	
4.4	A Brief Overview of Individual Litigation	
4.5	Collective Actions	
4.6	Procedural Issues: The Opt In/Opt Out Debate	
4.7	Funding Issues & Cost Mitigation: the key issue	
4.8	Cost Incentives	
4.9	Collective Actions Proceeding by way of a Representative/Specified Body	
4.10	Ombudsmen as Representative Bodies	
4.11	A Word of Caution	
4.12	Collective Action and Restorative Justice	
4.13	Training and Organisational Needs	
4.14	A Provisional Conclusion on Parallel Tracks	

<b>5.</b>	<b><u>APPLYING RESTORATIVE JUSTICE TO CONSUMER CASES</u></b>	<b>47</b>
5.1	Restorative Justice and Criminal Justice	
5.2	Restorative Justice in the Health Service	
5.3	Restorative Justice in Schools	
5.4	Restorative Justice in Ombudsman's Schemes	
5.5	Restorative Practices & Consumer Redress	
5.6	Securing an apology	
5.7	Victim-Offender Dialogue	
5.8	Achieving reparation	
5.9	Closure for Victims	
5.10	Provisional Conclusions	
<b>6.</b>	<b><u>MAIN EMPIRICAL FINDINGS</u></b>	<b>64</b>
6.1	Number of consumer cases	
6.2	Restorative Justice - Issues	
6.3	Representative Actions - Issues	
6.4	Focus Group Exercise	
6.5	Discussion/Analysis of the Results	
6.6	Conclusions from the focus Group	
<b>7.</b>	<b><u>USE OF EXISTING COMPENSATION OPTIONS</u></b>	<b>73</b>
7.1	Overview	
7.2	Provision of Consumer Redress by the Criminal Courts	
7.3	Assessing Compensation Awards	
7.4	Issues in Seeking Redress for Consumers	
7.5	Summary	
<b>8.</b>	<b><u>CASE STUDIES</u></b>	<b>78</b>

<b>9.</b>	<b><u>CONCLUSIONS AND RECOMMENDATIONS</u></b>	<b>92</b>
<b>10.</b>	<b><u>APPENDICES</u></b>	<b>96</b>
1	Consumer Protection Case Examples	
2	Application of Enforceable Undertakings in Australia	
3	Compensation Data (1 November 2007 to 31 October 2008)	
4	Enforcer/regulator Research questionnaire	
5	Consumer Representative research questionnaire	

## **1. INTRODUCTION**

### **1.1. Overview**

This research is into the need for, and mechanisms to achieve satisfactory compensation for groups of consumers where they have suffered detriment. The research was commissioned by the Department for Business, Enterprise and Regulatory Reform (BERR) following consultations in 2006 on the issues of representative actions for consumers and regulatory justice. The research considers the need for such measures and the mechanisms by which these options might be applied to consumer cases.

Changes to the consumer protection regime in the UK should be considered within the context of a policy environment which sees the Government aiming to encourage parties to settle their disputes more quickly, cheaply and effectively and with court action the option of last resort. The Hampton Review (2005) on regulatory inspections and enforcement concluded that the regime for achieving compliance with business regulations was complex and ineffective. Recommendations made by the review changed the way that regulators and enforcement officers go about their work. The Macrory Review (2006) into improving compliance among business looked in detail at sanctioning regimes and mechanisms for securing compliance with regulations. The Macrory Review made a number of recommendations for improving the regulatory sanctioning system including recommendations that the Government should introduce pilot schemes involving the use of Restorative Justice techniques to cases of regulatory non-compliance, regulators should have an increased range of sanctions available to them including Fixed and Variable Monetary Administrative Penalties, and alternative sentencing options in the criminal courts should be introduced for cases relating to regulatory non-compliance.

Both the Hampton and Macrory Reviews identified that the regulatory sanctioning regime is complex, ineffective and often fails to achieve redress for consumers. The aim of the proposed reforms was to reduce the regulatory burden on business while introducing a more streamlined enforcement regime for regulatory infringements providing regulators with a wider range of enforcement options that went beyond simply punishing offenders. The Government's consultations on Hampton and Macrory were supplemented by a 2006 BERR consultation on representative actions

for consumers. The premise of the proposal was that periodically groups of consumers lose relatively small sums at the hands of the same trader and that while some consumers have access to means that will resolve disputes there are many instances where alternative redress options have been exhausted and court action may be the only choice for the consumer. However, vulnerable consumers might be reluctant to take court action, some consumers might be unaware of their rights or consider that the amount is too small to bother taking court action, and some consumers may simply be unable to navigate the legal process themselves or afford the legal fees necessary to do so. In such cases, representative actions might provide a means for resolving the complaint by allowing a suitable body to bring an action on behalf of consumers. However while the BERR consultation resulted in opinions on how such actions might work and some evidence that there may be support for making the option for representative actions available to consumers it did not provide compelling evidence of need for this option.

This research therefore investigates the types of consumer cases that might be suitable for collective actions, and conducts an analysis of how representative actions would have to work to deliver results. The research also looks at whether Restorative Justice would be an effective means of achieving redress without recourse to the court system in consumer cases and assesses the evidence of need for both options by looking at the areas where consumers currently have difficulty in achieving redress.

This report attempts a synthesis between the two approaches of collective action (either by individuals acting as a group or through a representative body) and restorative justice, showing how they differ; how they may occupy different places in a scheme of redress for consumers and how they might effectively be engaged together when appropriate.

## **1.2. Research Outline**

The research was designed to achieve the following outcomes:

- Identify types of consumer cases (not including competition cases) where groups of consumers are suffering detriment and where representative actions might realistically deliver redress;

- Assess the approximate likely number of such cases in the UK every year and the approximate amounts of money at stake;
- Offer an initial analysis of the broad benefits of formal court action under a representative action for such cases, and explore how to operate effective systems that avoid a litigious culture;
- Analyse whether alternative mechanisms such as non court-action under Restorative Justice or other forms of ADR would bring about resolution of cases where consumers have suffered detriment and have not received redress;
- Identify whether Restorative Justice could work in consumer protection cases if public enforcers were offered the flexible remedies proposed in the *Regulatory Enforcement and Sanctions Bill* (now passed as the *Regulatory Enforcement and Sanctions Act 2008*) and were prepared to use them to impose restorative remedies.

The Hampton Review concluded that regulators do not give enough emphasis to providing advice to business to secure compliance with regulations. The review also concluded that regulators lack effective tools to punish persistent offenders and reward compliant behaviour by business.

Representative actions and Restorative Justice represent two different mechanisms for resolving consumer complaints and disputes with traders. Representative actions provide for a means through which aggrieved consumers can pursue court action (together with other consumers who have suffered similar detriment) while Restorative Justice provides a means through which companies who have infringed regulations can put things right, often through dialogue with the affected party and by offering a solution that, where possible, repairs the harm caused by the trading or business practice.

In carrying out this research project we have considered a number of issues relating to consumer redress and Restorative Justice. Collective redress in consumer cases often relies on the input of lawyers who have sufficient interest in the case but in theory at least consumer groups and/or regulators might also be able to take cases



on behalf of consumers to resolve disputes that affect large numbers of consumers. The BERR consultation on representative actions identified; concerns among business about a move towards a more litigious culture and American style class actions, that consumer organisations and the Office of Fair Trading (OFT) consider that representative actions should be for both named and unnamed consumers, that legal firms were divided on whether there was a need for representative actions and that trading standards authorities generally supported confining representative actions to named consumers and supported permission stages to remove unwarranted claims. Trading standards also had concerns about resource implications and we consider this issue within the research.

Given the relatively short period in which this research was conducted there are inevitably limitations on what could be achieved and we make no pretence that the research findings offer a complete solution to the problem of consumer detriment. But we consider that the research aims have been broadly met and set out our reasoning below.

## 2. **EXECUTIVE SUMMARY**

The remit of this research is to consider the evidence of need for representative actions and restorative justice to be introduced into consumer cases and how such measures might need to work to achieve consumer redress. To achieve this, the research has sought to identify the types of consumer cases (not including competition cases) where groups of consumers are suffering detriment and where representative actions might realistically deliver redress and to assess the approximate likely number of such cases in the UK every year and the approximate amounts of money at stake. The research has also evaluated how representative actions would need to work through formal court action, whether alternative mechanisms such as non-court action under restorative justice and other forms of ADR could bring about resolution of cases where consumers have suffered detriment and has evaluated whether restorative justice operated by public enforcers could achieve effective consumer redress. We are aware that some of the issues raised in this research report may be considered as part of the consumer law review being carried out by BERR but we include them here as part of our consideration of representative actions and restorative justice where appropriate.

The evidence of the OFT and case examples provided by Trading Standards officers indicate that there is a significant number of cases where consumers suffer detriment and do not receive redress. It is regrettably difficult to provide a precise figure for the number of cases because a range of factors can influence whether a case is reported to enforcement agencies for action. The enforcement agency or regulator may also decide not to pursue a case and at the conclusion of the case records may not be kept of whether a remedy has been provided for the consumer or whether the consumer has needed to take civil action to resolve the matter.

This research has, however, identified that even where enforcement action is effective and successful (including where a prosecution results in a conviction) this does not mean that consumers achieve redress. Indeed trading standards officers, consumer representatives and the OFT agree that in the majority of cases consumers will still need to take civil action in order to obtain compensation or to achieve some other form of redress. This being the case, the need for some form of restorative justice or other form of non-court ADR could be justified by the sheer

number of cases that do not result in an effective remedy for the consumer if the intent is to make it easier for them to do so. While court action may provide for punishment of offenders and ultimately may result in changes to business behaviour consumers may still be left without adequate redress at the conclusion of the regulatory enforcement process and in the majority of cases will need to take civil action in order to obtain compensation or achieve some other forms of redress. This puts individual consumers (or an affected group of consumers) at the disadvantage of having to seek legal advice and to bear the costs of their own legal action. While there is an identifiable gap where consumers are not receiving redress the role of consumers is also an issue to be considered. Significant numbers of consumers may choose not to take legal action for a variety of reasons. The individualistic nature of cases also means that a wider problem that affects a number of consumers may not be resolved and that similarly affected consumers are not always identified.

However this need for separate civil action to be taken as part of the process for achieving redress for consumers while identifying a clear inadequacy in the effectiveness of the regulatory enforcement regime should not be taken to mean that there is solely a need for new measures. Trading Standards officers and business representatives have indicated flaws in the existing regime that means that even where the possibility for compensation to be awarded by the courts is available in consumer cases it is seldom used. The lack of willingness by the courts to award compensation and redress to consumers may, therefore, be an issue that requires further study as it may offer an opportunity to provide for more effective redress for consumers under the existing consumer protection regime. The use of conditional cautioning under the *Criminal Justice Act 2003* has also been proposed as a means of achieving consumer redress and is an issue that has been pursued by LACORS.

Our review of the responses to the 2006 BERR consultation on *Representative Actions* and interviews and evidence collated for this research indicate general agreement that representative actions *could* provide for more effective consumer redress by allowing a representative group to take on such actions on behalf of consumers. However enforcers and regulators indicate that they do not wish to take responsibility for pursuing these cases and identify practical difficulties in taking representative action cases even if a mechanism to make this option more widely available is introduced. (It should also be noted that business is not yet persuaded that there is a need for any additional measures). In addition there are difficulties with consumer groups taking on representative action cases due to the lack of in-

house legal expertise to bring such cases the cost of obtaining outside legal expertise and the current costs regime for such cases.

Regulators and enforcers have concerns about having to take action to obtain redress for the consumer and effectively becoming 'judge, jury and executioner'. They consider that the purpose of their enforcement action is to secure compliance with legislation rather than to punish business for causing harm to consumers. In particular, enforcers consider that it is not their role to obtain compensation for consumers and explain that providing advice to business to achieve compliance is a legitimate means of resolving complaints. Prosecution is often the last resort and a mechanism that regulators and enforcers accept frequently does not resolve things for the injured consumer. Enforcers and regulators do not wish to take responsibility for taking representative action cases on behalf of consumers and there is a general reluctance to apply for powers to do so. Enforcers and regulators would also be opposed to these powers being imposed on them and have concerns that cases that might achieve easy redress could result in unrealistic expectations on the part of consumers that regulators and enforcers can routinely achieve redress and there is no need for the consumer to take actions themselves.

But if regulators are unlikely to take on representative actions on behalf of consumers there are also difficulties in consumer groups doing so. With the exception of Citizens Advice Bureaux and Law Centres there does not currently exist a national network of consumer groups/centres potentially capable of taking on representative actions on a regional basis. Resources, the need to employ lawyers and the costs regime in civil cases are all factors that would prevent national organisations such as the NCC (now Consumer Focus), Which? and Citizens Advice from taking on representative actions at a national level. There does not, therefore, appear to be an easy solution to the problem of who would be able to take on representative action cases on behalf of consumers even if the option were available. This does not, however, mean that the option for representative actions should not be attempted and we propose a model for introducing representative actions that would allow consumer groups to work with lawyers to bring cases and a means through which consumer groups at a local and national level could also bring cases on behalf of affected consumers. There are difficulties in doing so but a number of case models are presented in this research which identify the issues that may be suitable for representative actions.

This research also identifies that understanding of exactly what restorative justice is varies among enforcers, regulators, business and consumer groups with knowledge of the principle of victim-offender dialogue and compensation frequently shown by respondents. But restorative remedies for complaints need not consist solely of financial compensation and can involve other means of making reparation; primarily aimed at putting the consumer back in the position that they would have been in had the fault not occurred while also recognising the inconvenience to which consumers have been put and in some cases providing some remedy that recognises this element of a complaint or dispute. We consider that the reliance on financial compensation in debates about restorative justice in consumer cases is potentially misleading as there is scope for enforcers and regulators to implement a wider range of remedies which truly reflect the harm caused to consumers. Where it is not possible to put the consumer back in the position they would have been in had the fault not occurred 'compensation' could mean some other means of addressing or recognising the harm caused to consumers. For example payment of 'time and trouble' compensation, an apology or the taking of remedial measures that address the wider harm caused by a business practice such as; providing an enhanced or discounted service, funding a consumer education programme or environmental improvements or initiating a product replacement scheme. Business representatives have also provided examples of where business voluntarily does this which indicates that the undertaking provisions contained within the *Regulatory Enforcement and Sanctions Act 2008* might provide a means through which business and regulators can work together to apply restorative principles and achieve redress for consumers, even where no formal victim/offender dialogue is carried out as part of finding a remedy.

However the *Regulatory Enforcement and Sanctions Act 2008* also provides for restorative penalties to be applied by regulators and enforcers but this research identifies that there is no clear consensus on how and when such penalties would be used. Some trading standards officers have indicated that they consider that restorative justice would be more suitable for 'low level' non-criminal offences and should not be used across the board in consumer cases.

The view of regulators and enforcers expressed in this research was overwhelmingly that any restorative penalties should be subject to criminal rather than civil enforcement. The reason given for this is the difficulty in enforcing civil sanctions,

with enforcers and regulators indicating that the payment of civil penalties and compliance with court judgements is relatively low and that little attention is paid to ensuring that traders and businesses convicted at court and required to provide redress actually do so. Enforcers indicate that because of this they would be reluctant to use any new powers (other than fixed penalty fines) unless there was a clear process in place for ensuring that any remedies are carried out. This also makes the use of the small claims court undesirable.

Lack of knowledge of their rights by consumers may hamper the level of opt-in to representative action cases and so mechanisms to ensure either that consumers are actively sought out to join in a representative action or to provide for redress for other consumers similarly affected in the event of a successful case are essential.

While both restorative justice and representative actions may in theory provide a solution to the problem of consumer redress the evidence is that despite some evidence of need there are a number of problems with introducing restorative justice and representative action measures and that there are specific case models where problems may occur and effective consumer redress may not be achieved. We outline some of the difficulties in this research and discuss specific case examples that illustrate both how representative actions and restorative justice could work in consumer cases but also where they are unlikely to be successful and the reasons for this. For example there are significant difficulties in pursuing either representative actions or restorative justice in cases where traders are based overseas, simply disappear to avoid enforcement action and litigation or in those cases involving multiple small amounts of money (i.e. a large number of consumers suffering a small amount of financial loss or detriment) where the trader would not realistically be able to pay any compensation or costs or lacks the resources to carry out any other form of redress identified as suitable for resolving a dispute.

One proposal put forward during interviews, in the academic literature and considered by this research is that of an independent Consumer Ombudsman along the lines of the Nordic Ombudsmen who could consider representative actions and implement restorative justice to deliver effective and efficient enforcement, compensation and redress for consumers. Having such an independent, publicly funded adjudicator could result in a considerable saving on the cost of private collective actions, eliminate the concerns of regulators and consumer groups about the costs of these actions and also address the concerns of business about the

changed enforcement regime. We consider the role of Ombudsmen as representative bodies in this research but acknowledge that such a move would require fresh legislation. But the development and costing of pilot approaches on restorative justice and representative actions is an issue that needs consideration in addressing these issues and we highlight those areas where further research and/or pilot approaches may yield benefits.

### 3. **METHODOLOGY**

This research was carried out using a combination of qualitative and quantitative data. Structured questionnaires were used (see appendixes) which included questions designed to obtain quantitative data relating to the number of consumer protection cases reported and prosecuted each year. Qualitative questions were also designed to obtain views on restorative justice and representative actions and evidence from enforcers, regulators and consumer groups on cases where consumers continue to suffer detriment.

#### 3.1. **Data Collection and research stages**

Our methodology for the research included a combination of questionnaires, interviews and electronic survey methods together with extensive use of documentary evidence. The survey design was tested with trading standards officers and our own research staff to identify the survey design most likely to yield meaningful results but recognised that the response rate was likely to be low. The primary data collection was supplemented with a review of the literature and best practice on restorative justice and representative actions and also a review of the responses to previous consultations on regulatory justice, representative actions in consumer protection cases and on the draft *Regulatory Enforcement and Sanctions Bill*. The primary data collection was carried out in the following stages:

- **Stage 1** consisted of a preliminary questionnaire to enforcers in the East Midlands and Eastern Regions and to a small number of selected regulators such as the OFT. The objective of Stage 1 was to produce a sample of responses that would provide interim data on the types and number of consumer protection cases that might be suitable for restorative justice and representative actions. Data collected in Stage 1 also provided responses that identified issues to be explored in the next stages of the research. The responses also identified changes that needed to be made in the research questionnaires or specific issues to be explored in the research interviews. For example, early responses at Stage 1 identified that there was no shared understanding of what restorative justice was and so the questionnaires and research covering letter needed to reflect the possible lack of understanding



of the issue under consideration.

- **Stage 2** consisted of a questionnaire to consumer groups and consumer representatives such as the NCC, Which? And Citizens Advice to identify their views and obtain evidence on the types of cases, number of cases and the value (to the consumer) of cases that they would wish to see pursued via representative actions.
- **Stage 3** consisted of a roll out of the questionnaire to a wider group of trading standards officers and enforcers to provide greater coverage in England and Wales. This aspect of the project was intended to identify any difference in views between trading standards officers, enforcers and regulators and to ensure that a sufficient number of responses were obtained to produce a meaningful sample of responses for the research.
- **Stage 4** consisted of interviews with trading standards officers, other enforcers and regulators, consumer groups and consumer representatives and some business representatives.

The primary data collection exercise was carried out alongside a review of:

- Consultation responses on *Regulatory Justice in a post-Hampton World*
- Consultation responses on *Representative Actions in Consumer Protection legislation*.
- The enforcement policies of trading standards offices in the East Midlands and Eastern regions.

Analysis of this documentary information helped to identify issues to be pursued in the interviews and for consideration in developing case models.

### **3.2. Response to the research**

There was a 25% response to the Stage 1 'pilot' questionnaires. While this represented a low response level to the 20 questionnaires sent out at Stage 1 it was

not entirely unexpected. It was anticipated that busy enforcement offices would not immediately respond and might require some encouragement to do so. In addition, the imminence of the Trading Standards Institute (TSI) Conference which took place within three weeks of the questionnaires being despatched was thought to be a factor that might affect the responses with authorities either waiting to hand in their questionnaires at the conference or wishing to raise questions or request interviews at the conference where a BERR workshop on Restorative Justice was held. Indeed at this workshop at the TSI conference a number of authorities requested interviews and presentations on the research and indicated that questionnaires had been received within their offices but had not yet been completed. Officers in three authorities expressed some concern that their managers might not respond to the research and requested additional questionnaires to be sent direct to them to ensure that a response was submitted by their office. One consumer group (the NCC who had received a questionnaire as part of Stage 2 of the research) also requested an interview which took place within three weeks of the TSI Conference.

Pressure of work was cited by a number of officers as a reason for not responding to the research. This was anticipated as a potential problem and we also anticipated that a number of officers would not view completion of a questionnaire or a response to the research letter as a priority. To address the issues the following steps were carried out:

- The handing out of an additional 25 questionnaires at the TSI conference. Some trading standards offices also provided business cards requesting that an electronic version of the questionnaire be sent to them;
- Carrying out a 'focus group' exercise as part of the BERR Restorative Justice Workshop which allowed us to establish whether trading standards officers attending the conference shared the views of others that had already been raised during the research;
- Follow-up emails, telephone calls and letters to those offices that were sent a questionnaire in the original sample of questionnaires but who had not responded; and
- Commencing the formal programme of interviews.

Despite the programme of follow-up work, responses from trading standards officers and consumer groups remained low but where possible, documentary evidence was

used to identify relevant views on the research issues.

### 3.3. Nature of the responses

Not all respondents elected to complete the questionnaire when responding to the research and a number of interviews were arranged for those that preferred to provide information in this way. Organisations approached to take part in this research were given a choice of whether to complete a research questionnaire or take part in an interview. Interviews proved to be the most popular mechanism for individuals to provide evidence for the research. The number of organisations approached to take part in the research and the number of interviews subsequently undertaken is shown below:

Type of Organisation	Sample approached (n)	Interviews achieved (n)
Enforcer/Regulator	50	8
Consumer Group or Representative	10	2
Other <sup>1</sup>	10	4
<b>TOTAL</b>	<b>70</b>	<b>14</b>

Some 15 Trading Standards Offices (TSOs) indicated that they would respond to the questionnaire but did not do so. The short timescale allowed for this research and other business pressures are factors in this and two regional trading standards organisations have indicated that they require presentations on the research at which they might submit further evidence. Due to their already agreed meetings calendars these presentations are outside the timescale allowed for this research. However the willingness of officers to discuss issues during telephone interviews helped to ensure that information was received. Officers also referred to their previous consultation responses on *Representative Actions*, *Regulatory Justice* and the draft *Regulatory Enforcement and Sanctions Bill* as adequately reflecting their current views even though some changes had been made to the draft Bill which addressed some early concerns.

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<sup>1</sup> The 'Other' category in this table includes business representatives and representative bodies such as LACORS and the TSI

The relatively low level of questionnaire responses from TSOs was a concern as interview responses while providing valuable qualitative data and casework examples did not always provide the required quantitative data on numbers of cases and the value of cases in terms of consumer detriment. However, the OFT provided a comprehensive response which in addition to a completed questionnaire also included:

- Evidence on the number of cases taken by Trading Standards across England – trading standards are required to inform the OFT of intended and actual prosecutions and OFT data supplied as part of its response provides data on numbers of cases and the total amount of fines by category of offence (e.g. second-hand cars) and area of legislation (e.g. *Trade Descriptions Act 1968*);
- Consumer Complaints data – the OFT has provided more detailed data on numbers of complaints received by Consumer Direct, data from its consumer law casework and data on consumer credit casework;
- The Consumer Detriment Report – the OFT has supplied a copy of this report which assesses the overall value of detriment in the consumer sector and the frequency with which consumers experience problems with goods and services;
- Mass Market Scams – The OFT supplied a copy of its (2004) research report into mass marketed scams which estimates the direct cost to UK consumers of scams to be at least £1 billion a year; and
- Enforcement priorities – The OFT has also provided information on its enforcement principles and enforcement priorities and this evidence is helpful in identifying how regulators determine which cases will be pursued and where this might differ from the views of enforcers such as trading standards.

In addition the OFT provided some examples of enforceable undertakings accepted by the Australian Competition and Consumer Commission (ACCC) and this supplemented our own research into the enforceable undertakings model in operation in Australia. Case information and the issues of the research were also explored further in an interview with representatives from the OFT.

The views of business were also considered in this research. In addition to an analysis of the previous consultation responses on the issues referred to above, a meeting was arranged with the CBI's Legal Advisor, a representative from the British Retail Consortium and a representative from Boots PLC (also the Chair of the CBI's

Consumer Affairs Panel). This joint interview provided much useful information on the views of business and was supplemented with policy information from the CBI on Collective Redress.

## **4. CONSUMER GROUPS/REPRESENTATIVE ACTIONS**

### **PARALLEL TRACKS: SANCTIONS & CIVIL ACTIONS**

#### **4.1. Sanctions**

Part Three of the *Regulatory Enforcement and Sanctions Act 2008* ('The Act') by offering an enhanced sanctions regime to local authority regulators will, in accordance with the recommendations of the Macrory Review, shift attention from criminal proceedings against those who have breached regulatory requirements to a regime based on civil penalties, including fixed and discretionary penalties. Whilst, the nature of the legislation is that the details will emerge as secondary legislation it is clear that the emerging regime of fixed and variable monetary penalties; compliance notices; restoration notices and enforcement undertakings will give regulators a subtle and powerful range of enforcement tools.

The Act changes the underlying philosophy of local authority regulators, particularly, TSOs from 'neutral' prosecutors putting evidence before a third party tribunal for an independent decision to a body much more involved in tailoring the sanction to the offence and to the wider public interest subject, of course, to an appeal to an independent tribunal. It seems inevitable that this wider role will bring regulators into a more direct relationship with complainants as they will be responsible for the whole process of sanctioning rather than simply evidence gathering and if a decision is made to prosecute putting the matter before the court. In particular the discretionary penalties procedure which involves receiving representations and/or objections from the regulated person might well evolve in appropriate cases (particularly group cases) to a tripartite arrangement whereby the victim is also consulted about the process and its destination. This seems in harmony with regulatory principles including the transparency and accountability requirements of Section 5(2) of the Act and the concept of consistency. While, the legislation is focused on regulated persons, e.g. traders, there seems no reason why the regulatory philosophy cannot encompass the relationship with the injured person. Indeed there are many reasons why this should be so. Certainly it would be in accordance with the current Consumer Law Review which in Section 3 calls for reform to assist consumer empowerment and at Section 3.1 (a) calls for consumers who: 'have knowledge and means to exercise their rights and adequate support to resolve disputes proportionately'.

A difficult question is whether, in accordance with the BERR approach as outlined in the Consumer Law Review (at 3.25) and in accordance with wider government policy, the objective to encourage Alternative Dispute Resolution (ADR), for example by mediation by a neutral mediator whose task is to bring the parties together and attempt to produce a settlement often by suggesting a 'creative' solution,<sup>2</sup> fits into the approach outlined above. The regulatory enforcer under the Act will act as prosecutor and determiner of penalty, subject to appeal. While the Act sets out an approach of dialogue between the regulator and the regulated person<sup>3</sup> this report suggests that dialogue could, in appropriate cases, be widened to include an injured party.

Here there is potential conflict between the regulator in a prosecutorial/adjudication role with a public duty to do justice impartially<sup>4</sup> and the concept of ADR with its philosophy of attempting to create space for agreement between parties. As stated above ADR attempts not just to slice up the amount claimed in a zero sum game but to 'make the cake larger' so that 'nobody loses'. Classic examples of this occur in commercial disputes for example a contractual dispute over the quality of goods supplied by a manufacturer to a retailer. This might be resolved by the manufacturer agreeing to guarantee quality and offer a price discount in return for the retailer placing a larger order. In this way the commercial relationship is preserved. (There are obvious comparisons in other situations where continuing relationship is important e.g. within the family, at work etc) This type of situation may occur in the context of consumer/retailer. For example, a settlement relating to defective goods may involve both the replacement of the goods and discounts on further purchasers to enhance consumer loyalty. However, there are many cases with a dispute over a major one off purchase where the consumer wants redress and, possibly an apology, but has no great desire or need to continue in relationship with the retailer or manufacturer.

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<sup>2</sup> Section 27 of the Act (Guidance and the Acceptance of Undertakings)

<sup>3</sup> Department for Business Enterprise & Regulatory Reform, (2008) *'Regulatory Enforcement and Sanctions Act 2008: Guidance to the Act'*, London:BERR

<sup>4</sup> The role of prosecutor and initial tribunal is an unusual one in English law but will borrow from these roles the impartiality in relation to the injured person (victim) and regulated person that is found in the Prosecutor's Code and the duty to act impartiality laid on courts and tribunals (<http://www.cps.gov.uk/publications/docs/code2004english.pdf> )

It is important to note that ADR is not a 'free lunch'. Whilst rates for ADR vary most mediators charge an hourly or daily rate and in complex cases the charges can be high.

Although in some sectoral ADR schemes the retailer/manufacturer pays the costs of ADR in any event this is not always so. Thus, whilst settlement of consumer cases will normally include the retailer/manufacturer paying these costs the consumer cannot be sure going into the ADR process that some of the bill might have to be paid by the consumer in any event. Sorting this charging issue in advance of the ADR process will simply add to the charges of any lawyer involved.

It may be that a more appropriate approach is that of restorative justice which as stated at Section 5.8 below provides that

'Potentially it is in the area of achieving reparation for consumers that restorative justice can best be applied to consumer cases. The core values of restorative justice are to secure healing for the victim, responsibility on the part of offenders and making amends for the offence. In consumer cases, this can be achieved as long as enforcers and designated regulators have the power to make binding awards and pursue negotiated settlements for complaints. Where legislation provides that regulators can decide not to take enforcement action if they can achieve compliance through negotiation and settlement with potential offenders; this option could be used by applying restorative principles.'

This argument is expanded in Section 5 of this report but it is clear from the analysis in this report that, in this context, restorative justice has more in common with *negotiation* in the context of a sanction regime between a public regulator and a regulated person or organisation than the approach of ADR, in particular mediation, which envisages parties resolving a dispute between them *without* the wider public interest necessarily being involved.



## **4.2. Civil Action**

The parallel track to enforcement albeit of the subtle and dynamic approach envisaged in the Bill is civil action between individual consumers or groups of consumers and a defendant or defendants who are alleged to have harmed the consumer. ADR continues to have influence as part of a settlement process or when 'suggested' by a judge.<sup>5</sup>

## **4.3. Lessons from Competition Damage Cases**

This research deals with consumer cases excluding competition damage cases. The work in that area is well advanced and subject to a White Paper from DG Comp<sup>6</sup>. However, there are important lessons to be learned from that area because in relation to some aspects of competition damages e.g. individual consumers damaged by cartel activity there are areas of close comparison. A consumer may be damaged by being overcharged by a cartel or by buying goods on a false description from a single trader not acting anti-competitively in a classic sense (e.g. in a cartel or by exploiting a dominant position) but by exploiting asymmetry of information 'persuading' a consumer to purchase a product at an overprice. Most importantly there are procedural and practical examples that can be read across to consumer redress. These include issues of 'equality of arms' and the use of a regulatory finding of bad behaviour in the context of follow on civil action (effectively 'pleading a conviction' in a civil case which makes the task of proving the case very much easier)

## **4.4. A Brief Overview of Individual Litigation**

This section is not addressed to practicing litigation lawyers who will find it superficial but to those stakeholders and policy makers with expertise in the regulatory/criminal enforcement area rather than in acting as agents for individuals in civil cases. As noted in Section 4.9 and elsewhere in this report many agencies in the field of consumer redress, including TSOs, have not historically been much engaged in the civil courts.

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<sup>5</sup> English judges cannot force parties to mediate but by reminding them of the cost danger of unreasonably refusing to mediate they can 'persuade' them. *Halsey*

<sup>6</sup> Commission of the European Communities, (2008) '*White Paper on Damages for breach of the EC antitrust rules: COM (2008) 165 Final*', Brussels: Commission of the European

Individual consumers who suffer loss through the wrongful acts of businesses have a range of substantive law remedies (breach of contract; tort; statutory duty etc) which can be pursued through the courts. If these claims are of sufficient importance to the individual — normally equated with monetary loss — disappointment and aggravation not normally being recoverable heads of damage — then there are grounds to proceed in a ‘good case’. A ‘good case’ in this context is a complex matrix of risk assessment of the certainty of the substantive law; the quality of the evidence; the ability to prove the loss; the procedural regime; the tenacity of the prospective claimant and, most importantly, the chances of the prospective defendant satisfying a judgment. These factors are never wholly certain and wronged parties in the UK (as compared to other areas of Europe such as Germany<sup>7</sup>) are generally reluctant litigators.

The key problem & the key advantage for individual litigants is the cost of going to law, the price of entering the court arena. The problem relates to the currently open ended and unpredictable nature of lawyers’ charges (normally calculated on an hourly paid basis in excess of £200 for civil work). If a case is brought by an individual and *lost* then the claimant pays the defendant’s costs: if the case is *won* then the defendant pays all or a high proportion of the claimant’s costs.

Litigation in the Small Claims track of the County Court (for non personal injury claims of less than £5000) is less of a financial risk because the loser does not normally pay the winner’s lawyer’s fees. However, in a ‘good case’ this cost protection might not be in the interest of a claimant as if the claimant instructs a lawyer then the lawyer’s fee will have to come out of recovered damages rather than be paid by the loser. The headroom between a recovery of £5,000 or less and the likely lawyer’s bill may well be insufficient to make bringing the case economic.

Costs include court fees and out payments (disbursements) such as expert fees. Historically court fees have been relatively low in the United Kingdom, certainly as compared with the rest of Europe. However, this is somewhat of a false comparison

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Communities. Professor Peysner was part of the expert group co-ordinated by the Centre for European Policy Studies (CEPS) which contributed to this white paper.

<sup>7</sup> Stuyk, J. Terryn, E., Colaert, V., Van Dyck, T., Peretz, E., Nele Hoekx, N. and Tereszkiewicz, P., (2007) ‘An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings: Final Report’, Katholieke University Leuven/European Commission

as in European (Civil Law) countries the civil judge carries out tasks (such as interviewing witnesses) which in the UK would be carried out by the lawyers who will charge for it. In any event court fees in England and Wales have been rising at an accelerating rate in recent years.<sup>8</sup> In the Small Claims Track fees are not inconsiderable and may act as a dis-incentive.<sup>9</sup>

However, if litigants do proceed the conditional fee (no win: no fee) system (CFA) introduced under the *Access to Justice Act 1998* which effectively replaced legal aid for civil money claims, offers a viable way forward, particularly for personal injury claims. Many CFAs for individuals are now on a no win; no fee/win:no fee basis. That is the lawyer will rely on what is recovered from the defendant if the case is lost, not charging their client any irrecoverable hourly charges and take a hit if the case is lost. This obliges lawyers to carefully risk manage what cases they take on including the risk of whether the defendant is 'judgment proof'. It follows that this type of offering by lawyers is most likely in areas such as personal injury or housing disrepair where defendants are 'judgment proof' insurance companies or public authorities rather than in consumer law.<sup>10</sup>

This system protects the individual against their own lawyer's fees but not the risk of paying their own disbursements or the winning defendant's legal fees and disbursements. Litigation insurance covers this risk. This can be either 'after the event insurance' or 'before the event'/'legal expense cover'.

'After the Event' (ATE) insurance is purchased on a case by case basis to support a CFA and the premium is normally recoverable from the losing defendant. Although, the insurance applies to the individual case its calculation (rating) will be influenced by the pool of similar cases in the insurer's book and their success rate. Prior to the credit crunch the premium would often be paid *after* the case either by the losing

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<sup>8</sup> 'The Council remains very concerned about the high level of fees, driven by the policy of full cost recovery'. Annual Report of the Civil Justice Council 2007 Section 1.11

<sup>9</sup> £108 to issue a case in the court; £35 for allocating money claims between £1500 and £5,000 (no fee below) and £300 for the hearing fee if the claim is over £3,000 (less below) i.e. to claim for, say, £4000 costs £443.

<sup>10</sup> As many individual consumer claims will be under the small claims track limit they will benefit from the more user friendly procedure of this track in the County Court. However, winning cases with a simple procedure does not guarantee that the enforcement means available are satisfactory to recover damages and fees. See J Baldwin, *Evaluating the Effectiveness of Enforcement Procedures in Un defended Claims in the Civil Courts*, London: Lord Chancellor's Department Research Series 3/03 (2003).

defendant alongside other disbursements or out of the proceeds of the policy.<sup>11</sup>

Nowadays individuals will increasingly be asked to pay the premium in advance or take out a Consumer Credit Agreement to cover the premium as a way of reducing the insurer's risk (e.g. that the case is won but the defendant goes insolvent.)

Before the Event (BTE) insurance is generally sold to individuals as an add-on to household or motor policies. As the premiums are for generic cover they are not recoverable in a single case. In principle the insurer pays the individual's lawyer whether the case is won or lost but in practice lawyers who do this type of work cannot recover their fees from the BTE insurer and so they carefully risk manage their case load to ensure that they lose as few cases as possible.

Third Party Funding is a relatively new type of litigation support and is currently unregulated.<sup>12</sup> Essentially it involves selling a share in the prospects of damages to an external party (often a venture capitalist) in return for financial support from that third party for the legal and other costs of bringing the case and an indemnity against having to pay costs if the case is lost. This type of funding cannot benefit from the pooling of risk involved in BTE insurance and to a lesser extent in ATE insurance. As such the cost of support can be very high: figures of up to 40% are mentioned.

None of the above funding methods are predicated on the assumption that litigation is resolved by a judge at trial: less than 2% of civil cases issued in England and Wales reach trial. The most powerful procedural device to produce settlement is Part 36 of the Civil Procedural Rules which ratchets up the cost risk of litigation. The rule is a highly sophisticated system of risk transfer which allows both a claimant or defendant (or any multiple of them) to make offers to settle. For example, the claimant offers to settle for a given figure. If the defendant declines and the claimant matches or beats the figure then the claimant will be awarded additional costs and interest. The defendant can also make an offer to settle which if the claimant fails to 'beat' will, effectively, reduce the cost recovery the claimant can make leaving the claimant out of pocket. These are very effective ways of bringing to parties' attention the transaction costs of litigation.

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<sup>11</sup> This so called 'magic bullet' is an accounting device to post a notional premium as a cost to an insurer's account which in due course is either paid by the other party as part of the cost of losing the case or is absorbed into the insurer's overall payment out to the insured if the case is lost. In effect the insurer lends the premium to the insured.

<sup>12</sup> Napier, J., Hurst, P., Moorhead, R Musgrove R and Stutt, C., (2007) '*Improved Access to Justice: Funding Options and Proportionate Costs*', Civil Justice Council

Civil litigation in England and Wales is governed by the Civil Procedural Rules which while preserving the judge as a neutral referee and arbiter of the substantive issues in the case as advanced by the parties gives the judge the leading role in deciding procedural issues by the exercise of case management powers. For example the extent of documentary evidence and the use of experts will be ultimately determined by the judge. A party cannot simply 'outspend' another by demanding the production of masses of documents: the judge will determine if the documents are relevant and that the costs of their identification and production are proportionate.

This overview of the system for individuals suggests a carefully risk managed system as the following table suggests:

<b>RISK</b>	<b>MANAGEMENT OF RISK</b>
Substantive law or procedural problems	Use of a lawyer as adviser/representative
Need to identify recoverable damages	Ditto
Risk of winning case but having to pay own lawyer & disbursements because defendant cannot pay	CFA for own lawyers or ATE/BTE insurance/Third Party Funding
Risk of winning case but not recovering sufficient costs from Defendant to pay own lawyer's fees	CFA on no win: no fee/win: no fee basis

The above analysis whilst not suggesting that litigation is a pursuit to be taken on with equanimity does suggest that a careful deployment of risk management techniques can allow litigation risk to be assessed and catered for.

The above conclusion relates to generic individual litigation. In some areas of disputes, such as contract disputes between established businesses, civil action will be one of the methods of dispute resolution routinely considered if negotiations fail — although arbitration and ADR may be preferred. However, in the area of individual consumer redress civil action is rare. One study found that less than 1% of

consumer actions led to court action.<sup>13</sup> There may, of course, be an ongoing cost benefit analysis here reflecting the fact that most consumer claims are modest and that grossing up modest claims in collective action would be, all things being equal, more attractive to individuals in a sort of 'herd' instinct. However, when individual cases are aggregated as groups the risk management measures outlined above become much less effective. While the damages recoverable may simply be the aggregate of individual claims the *risks* are likely to be much higher and this, together with some residual procedural problems, explains why in England, as compared to the USA, collective actions are rare. The question of risk is the *leitmotif* for considering collective consumer redress by way of civil litigation.

#### **4.5. Collective Actions**

From a common sense point of view dealing with cases that share characteristics by litigating them together is plainly right. It saves money and resources, particularly judicial resources, by preventing the same issues being litigated and re-litigated in individual actions in different courts. (This is vividly illustrated in the ongoing litigation concerning bank charges which have been mired in complications involving thousands of cases proceeding independently.) Costs continue to 'follow the event' but the costs of generic issues are shared between the parties in the group and, it is assumed, the lawyer's work benefits all the group without having to be repeated. It seems to have the same comparative advantage that Adam Smith found in mass production. Regrettably, the history of group actions in the UK reveals quite as many disadvantages as advantages and some cases, such as the pharmaceutical cases (Ativan etc) have been disastrous.

It is currently impossible to make any sensible estimate of the cost of any type of complex action proceeding in the Multi-Track (the case managed track) of the civil courts in England. While, estimates of costs have to be filed they are not generally regarded as robust or necessarily represent the actual costs of the final outcome. However, it would be normal for the joint costs of collective actions to run well into six figures. Cases involving pharmaceuticals or industrial disease will have joint costs running into millions.

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<sup>13</sup> H.Genn, *Paths to Justice*, Hart, Oxford, 1999 p. 156

In considering collective actions three interwoven themes emerge in relation to procedure and finance:

- Procedural Issues: The Opt In/Opt Out Debate
- Funding Issues & Cost Mitigation
- Collective actions proceeding by way of a representative/specified body

Collective actions have been a matter of great concern for at least a decade in England and of increasing interest in Europe. One off litigation — business against business; individual against individual etc — remains the bedrock of dispute resolution and litigation. However, the process of globalisation; national and international mass marketing and production inevitably leads to an increasing emphasis on ‘massification’ the emergence of groups of victims of actionable disease or injury or civil wrong.<sup>14</sup> This is reflected in a series of reports which have attempted, not wholly successfully, to address the question of access to justice in relation to collective issues. The main reports which have informed our work are:

- Lord Woolf’s Access to Justice Final Report (Chapter 17)<sup>15</sup>
- OFT’s response to the EU consultation on consumer collective redress benchmarks<sup>16</sup>
- EU Commission re Third Party damage claims in competition<sup>17</sup>
- Civil Justice Council Reports<sup>18</sup>
- Reports to the Northern Ireland Legal Services Commission on development of a Contingency Legal Services Fund (CLAF)<sup>19</sup>
- Professor Mulheron’s research<sup>20</sup> into class actions and collective redress.

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<sup>14</sup> Mulheron, (2004) *The Class Action in Common law Legal Systems*, Hart Publishing

<sup>15</sup> <http://www.dca.gov.uk/civil/final/contents.htm>

<sup>16</sup> [http://www.ofc.gov.uk/shared\\_ofc/reports/ofc\\_response\\_to\\_consultations/ofc983.pdf](http://www.ofc.gov.uk/shared_ofc/reports/ofc_response_to_consultations/ofc983.pdf)

<sup>17</sup> See footnote 10 for reference

<sup>18</sup> See footnote 12 for reference. (This report builds on an earlier report ‘Improved Access to Justice - Funding Options & Proportionate Costs’ [http://www.civiljusticecouncil.gov.uk/publications/pr\\_0905.htm](http://www.civiljusticecouncil.gov.uk/publications/pr_0905.htm)) of which Professor Peysner was co-author)

<sup>19</sup> See J.Peysner ‘Follow the Money: Money Damage Cases in Northern Ireland’ in the anthology , *Transforming Lives: Law and Social Process*, Legal Services Research Centre, London, 2007

Dr. Christopher Hodges' work on regulation enforcement and compensation<sup>21</sup> which looks at the better regulation agenda and the implications of this and the Macrory report, Hodges work on regulation and civil justice<sup>22</sup> and his work on regulating consumer protection.<sup>23</sup>

The essential difficulty in most cases, particularly personal injury cases, is that cases may be both similar and different. They may share a common basis on which to establish liability but the damage claims, the quantum, may be quite different or there may be issues of contributory negligence that divides one case from another. Time saved by trying the cases together may be lost by arguments over these aspects.

#### **4.6. Procedural Issues: The Opt In/Opt Out Debate**

The Civil Procedural Rules instituted a specific set of rules for the aggregation and case management of cases which in accordance with the overriding objectives of the rules are more cost effective and justly tried together rather than separately: a Group Litigation Order (GLO). However, assuming that, as stated above, a modern consumer society is marked by mass production and mass consumerisation the fact that many individuals or small businesses share potential claims is not reflected in the number of group actions/claims actually brought — some 62 since 2000. A key reason for this is that a GLO requires a positive step by a prospective claimant to 'opt in' to join the 'club' to obtain all the benefits and suffer any detriments. This compares with the US style Opt Out system which establishes a judicially approved class of potential claimants, of which only a few may be actively involved at this stage. Many claimants are effectively 'in' the class action without having to take a

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<sup>20</sup> Mulheron (2008) 'Reform of Collective Redress in England & Wales: A Perspective of Need', a report for the Civil Justice Council  
([http://www.civiljusticecouncil.gov.uk/files/collective\\_redress.pdf](http://www.civiljusticecouncil.gov.uk/files/collective_redress.pdf))

<sup>21</sup> C. Hodges 'Encouraging Enterprise and Rebalancing Risk: Implications of Economic Policy for Regulation, Enforcement and Compensation' *European Business Law Review* (2007) 6: 1231 and C. Hodges *The Reform of Class and Representative Actions in European Legal Systems*, Hart, Oxford, 2008.

<sup>22</sup> C. Hodges, 'Competition enforcement, regulation and civil justice: what is the case?' *Common Market Law Review* 43: 1-27, 2006.

<sup>23</sup> C. Hodges, 'Collectivism: Evaluating the effectiveness of public and private models for regulating consumer protection' in W. van Boom and M. Loos (eds), *Collective Consumer Interests and How They Are Best Served in Europe* (Kluwer, 2007).



step and may become actively involved to claim their share of damages or benefits at a later stage.

The Opt Out system might appear unfair: why should a citizen with a contingent claim have it resolved with other claims without the individual's full and free consent? The main justification is that if efficiency suggests that issues should be dealt with together then opt out remains possible (if difficult) and, in any event, the whole process is carried out under judicial control. Most importantly, the claimants' actual or prospective membership of a class does not have financial consequences. The general pattern in the USA is that cases can be brought by claimants with only limited exposure to paying the other side's costs and fees if the case is lost. Their liability for their own expense is limited by the wide availability of contingency fee arrangements by claimant lawyers<sup>24</sup> and the fact that expert fees and other outgoings may be absorbed by these lawyers. This approach which offers a 'free ride' to claimants is particularly prevalent in class actions.

It would be wrong to assume that this system guarantees complete involvement by all prospective victims in the claim and thus offers the most just and, subject to a threshold of harm necessary to enter the class, the most efficient approach. General inertia; suspicion of lawyers even if they are offering a 'free lunch' and opportunity cost (even the most efficient system will require the claimant to do something in connection with the claim when they could be doing something else) will cap involvement.

Whatever the limitations, it seems in accordance with common sense that 'opt out' procedures are likely to maximise involvement in a class action while involvement in an 'opt in' group actions will inevitably be limited. Mulheron's report reviews the limited empirical evidence in both common law and civil law systems and reports on a very striking difference between rates of participation between the two regimes with 'opt in' being markedly less inefficient in involving claimants with potentially good claims. Mulheron suggests that a move towards 'opt out' i.e. a class action of some nature, is a necessary solution to resolve the 'unmet need' for reform of collective redress mechanisms in English civil procedure.

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<sup>24</sup> A contingency fee like a CFA is dependent on the result of the claim. However, a contingency fee is not based on a multiplier of normal fees but a *percentage* of damages

#### 4.7. Funding Issues & Cost Mitigation: the Key Issue

The difficulty with this debate is that it only takes the argument so far, 'opt out' (Class Actions) may be more efficient in aggregating good claims than 'opt in' (Group Actions) but this is far from the end of the matter. The concerns over costs noted above go to the heart of the argument between proponents of class actions and group actions and has not yet been comprehensively addressed.

Class actions take place in the USA in an effective regime of no cost peril for members of the class. Entrepreneurial lawyers act as agents for the class at their own risk (at least in respect of opportunity costs and outgoings). To create a new 'opt out' class action procedure in England without addressing the question of costs would create a massive anomaly. If the normal 'costs follow the event' rule were maintained then this is satisfactory if the case is won. However, if the case is lost who pays the costs? While the claimant class might be insured against liability this is theoretical as ATE insurance has proved to be very difficult to obtain in group actions because of the greater and more unpredictable risk. Third Party Funding might be available but at a high cost. Is it just to force a party who might be willing to 'opt in' and take the cost risk into a class where the funder will take 40%?<sup>25</sup>

It seems that creation of an 'opt out' system would require a comprehensive limitation to the 'cost follows the event' rule. There are two approaches that could be adopted within the current civil procedural environment: neither are satisfactory for this purpose.

Protective cost orders<sup>26</sup> allow claimants bringing cases against public authorities or public authorities without funds to apply to the court for the costs of the action to be capped or for them to be indemnified against costs entirely. These orders are intended to be exceptional and to recognise that some types of litigation are in the public interest and should not be constrained by cost pressures.

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recovered. This type of fee is not currently legal in England where a case has been issued in the court.

<sup>25</sup> This is, of course, similar to the position in the USA where claimant lawyers take their costs out of the damages pot before it is shared amongst the class. However, their cut is contractually and judicially controlled and likely to be lower as there is no requirement to obtain an indemnity against costs if the case is lost.

<sup>26</sup> *R (Corner House Research) v Secretary of State for Trade & Industry* [2005] EWCA Civ 192 and *R v Lord Chancellor ex p Child Poverty Action Group* [1999] 1 WLR 347

Cost capping is available to the courts in a wider range of civil litigation where there is a danger that costs are likely to be disproportionate.<sup>27</sup> In effect they impose a budget on the case so that parties know the extent of their cost risk. The courts have been reticent in ordering them and they are unlikely to be ordered before or at the start of litigation. As such they leave an uncertain cost risk.

Outside public interest litigation it must be questioned whether it is just for defendants, such as manufacturers in a collective consumer case, to face a case in which, even if they win, they cannot recover their costs. In a sense this could appear to decide the case before it starts as no economically rational defendant would defend a case if the costs of winning are disproportionate. This threat of 'losing even if winning' was a concern of defendants under the legal aid system and this might be seen to have been resolved by the introduction of CFAs backed by ATE insurance or other methods of funding. However, in a major collective action, assuming that insurance or funding can be obtained, there must be a fear that at the conclusion of the case cost protection is not available when it is called upon.<sup>28</sup>

A partial solution to this issue might be to extend the security of cost jurisdiction<sup>29</sup> to certain group actions. While, it is axiomatic that individuals cannot be debarred from issuing proceedings on the ground that it is suspected that they could not meet an adverse cost order<sup>30</sup> this does not apply to companies if there is evidence that they are in financial difficulties; for example, that they are in administration. There may be an argument that the court should be able to inquire into the bona fides of a group's insurance or funding support before allowing the group to proceed or to proceed on terms.

Alternatively, actions brought by representative bodies might be protected from the normal liability of paying the other party's case if the case is lost *in any event*. This would be an effective way of increasing civil access to justice but as stated above the balance between the rights of claimants and defendants would be disturbed. This

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<sup>27</sup> *Smart v East Cheshire NHS Trust* [2003] EWHC 2806 QB "that there is a real and substantial risk that without such an order costs will be disproportionately or unreasonably incurred; and that this risk may not be managed by conventional case management and a detailed assessment of costs after a trial; and it is just to make such an order"

<sup>28</sup> Some litigation insurers are based on jurisdictions outside the UK where regulation may not be as strict. As stated Third Party funders are currently unregulated and do not have capital requirements.

<sup>29</sup> A requirement that a claimant has to deposit funds or a guarantee by way of a bond so that in the event they lose the case they can meet the other party's costs.

<sup>30</sup> Reflecting the Article 6 right to a fair trial.

problem can be addressed in various ways including the use of cost capping. The more effective shield of a protective cost order is legitimate in public interest litigation because of the potential engagement of human rights and the regulatory function of judicial review. Very few consumer cases, even of collective interest, necessarily have such a strong public interest. For those that do, perhaps involving product safety or financial scams, there may be an emerging model in the court's attitude to environmental cases. Mr. Justice Sullivan in a recent report<sup>31</sup> draws the conclusion that the cost of procedures impede access to justice and there is some suggestion that protective costs orders are becoming more common.<sup>32</sup> Ultimately either cost protection must be available to protect the representative body (assuming it indemnifies the individual claimants) or in the process of registering representative bodies they must pass a test of financial viability. Outside the public sector this will be a high hurdle.

#### 4.8 Cost Incentives

The other side of the coin of worrying about mitigating costs is whether costs are enough? In the method of funding under a CFA lawyers will be paid on a basis that is affected by the result as the following table demonstrates:

<b>Nature of Cost Arrangement with Client</b>	<b>Effect of Success/No Success (As defined in Arrangement)</b>	<b>Recoverable from Losing Party</b>
Hourly Rate of Charge	Variable according to success usually with a minimum charge. May be reduced to nil if no success and no recovery from the other party	All or part may be recoverable (Subject to Court Assessment and/or negotiation between parties)
Success Fee	Variable as a multiplier of hourly charge. Not chargeable if no success.	All or part may be recoverable in addition to hourly charges (Subject to Court Assessment and/or negotiation between

<sup>31</sup> Ensuring Access to Environmental Justice in England & Wales.  
[http://www.wwf.org.uk/filelibrary/pdf/justice\\_report\\_08.pdf](http://www.wwf.org.uk/filelibrary/pdf/justice_report_08.pdf)

<sup>32</sup> *Litigation Funding* Issue 56, August 2008, page 17.

		parties) subject to a maximum of 100% of the hourly charges
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It follows that the law firm's reward for taking on a case is an increase in its normal charges *not* as in the USA contingency fee system a percentage of the damages recovered. In some group actions this may operate as a dis-incentive as the work involved may be relatively limited and therefore the success fee will be limited but the *chance* of success may also be limited. This reduces the firm's propensity to take the risk because of the risk/reward ratio. Conversely if the damages at stake were high and the work to achieve them was relatively limited then under a contingency fee system the risk (of unrecoverable legal charges by the firm) might be worthwhile. This is not to suggest that lawyer's will not take on cases but simply to note that the decision to do so is a complex one and the merits of the case are only part of a complex matrix.

#### **4.9. Collective Actions Proceeding by way of a Representative/Specified Body**

An alternative to groups of consumers acting together is for a body to act for them in bringing cases. It is anticipated that such bodies in taking on cases and in deciding how to resolve them would take into account both the claimants interests and the wider public interest. In this way some of the mechanics of the 'opt in/opt out' debate can be avoided. A representative body while not bringing cases in respect of theoretical losses could be more flexible in recognising that both individuals *and* the wider community may have suffered from a defendant's default.

Closer to home actions can now be brought under the *Enterprise Act 2002* for damages for anti-competitive actions. This requires an organisation to apply to be recognised as a specified body of which the Consumer Association ('Which?') is the only current example. The difficulties that the Consumer Association met in obtaining specified body status and the challenges that it met in bringing its first case (in respect of overpriced football shirts) are important exemplars.<sup>33</sup> The involvement of

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<sup>33</sup> It is understood that third party funding was not available in this case because there were insufficient claimants joining the claim by opting in.

the Consumer Association in trading activities, although ultimately resolved, did raise difficulties. The case itself was a 'follow on' case in which a finding had already been made that there had been anti-competitive conduct. The following news reports, repeated at length to make the point clear, suggest that even where liability is manifest there will still be difficulties:

*Philippe Ruttle, a partner at City firm Clyde & Co, acted for consumer group Which? in settling the first representative action brought at the Competition Appeal Tribunal. It was against JJB Sports, which had already been found to have fixed the prices of certain football shirts, including England shirts. There were an estimated two million affected consumers, and Mr Ruttle said plenty opted in to the action – they cut off the list of named claimants at 400 to make the case controllable. Though Mr Ruttle recognises that opt-out can make the complaint much larger, and thus easier to get off the ground, 'opt-in makes it more manageable, if more cumbersome'. The case was run on a CFA, but after-the-event insurers balked, even though liability was not an issue.<sup>34</sup>*

This was followed by:

*I write regarding the recent news article ... in which you reported comments from Philippe Ruttle of Clyde & Co about the representative action taken by Which? against JJB Sports.*

*The article states that 'plenty' of affected consumers opted in to the action but that Clyde & Co 'cut off the list of named claimants at 400 to make the case controllable'. This is not in fact correct. All claimants who came forward to join the action were represented in the case, and there was no point at which we, or Clyde & Co, 'cut off' the list of claimants.*

*As your article reports, there were an estimated two million consumers affected by the price-fixing of football shirts by JJB Sports and others. The fact that the participants in the case were numbered in the hundreds is a direct result of the difficulties in bringing these types of compensation claims. The passage of time between the overcharging and the action, and the relatively small amount of compensation, being just two examples.*

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<sup>34</sup> 'Class Actions will make claims easier' Law Society Gazette, 2008

*Despite this, the agreement reached with JJB Sports was a good deal for all of the affected consumers. Those who did not join the case still have the opportunity to claim £10 compensation by taking their shirt or proof of purchase into a branch of JJB Sports.*

*Dr Deborah Prince, head of legal affairs, Which?*<sup>35</sup>

These reports vividly illustrate the very real difficulties of group litigation in what can be seen as the clearest type of case where liability is not in issue.

How far could this model be adapted to be used for consumer redress? Here we must speculate in uncertain territory. Assuming that the costs and funding issues could be resolved and appropriate powers were available (which does not appear to be currently the case) then could and should representative bodies be available to take up the cudgels on behalf of consumers. The advantage of this approach is that representative bodies will take into account the wider public interest in deciding whether or not to bring a case and therefore this type of litigation will be less likely to attract an accusation of excessive litigation and 'fat cat lawyers' exploiting 'class actions' as is currently hotly debated in the USA.

The coverage of representative bodies should be such that both national and regional redress can be addressed. A trader using bad practices and causing injury in one region should not be able to avoid redress simply because there is no national dimension. Further, in so far as restorative justice marches hand in hand with civil action it is likely to be just as appropriate on the local stage. Indeed if the model involves consumers identifying themselves as an injured group and seeking restoration then this may often be based on a community.

Who might such representative bodies be? The obvious answer would seem to be TSOs who are in the front line of identifying and regulating bad practices; collect evidence and liaise with the public. They also routinely co-operate nationally and regionally.<sup>36</sup> As such they could act both in respect of redress for bad practice that affects the whole country or is limited to a local area. However, our research

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<sup>35</sup> A touch of Class' Law Society Gazette, 13 March 2008

<sup>36</sup> E.g. Staffordshire TSO took the lead as regulator for the Claims Management Sector. Regional scambuster teams bring together a number of TSOs and other organisations. See: <http://www.berr.gov.uk/whatwedo/consumers/enforcement/trading-standards/scambusters/index.html>

suggests that they are unlikely to wish to add to their regulatory burden and their concern over being 'judge, jury and executioner' under the new regulatory regime might be reflected in not wishing to be 'debt collectors' as well. Further, they are under resource pressure and are unlikely to be prepared to enter into a novel and challenging jurisdiction without fresh resources.

Additionally, TSOs are not law firms. Their normal model is to enter into arrangements with local authority legal services to act for them in cases which they choose or are unable to prosecute themselves. If TSO's were to act as representative bodies then it is unlikely that they would instruct those local authority bodies as they in turn are not law firms in the traditional sense but in house lawyers acting for a constrained group of clients in the same 'business' (local public services) and not for the general public. It is likely that TSOs would tender out the legal work to entrepreneurial lawyers prepared to conduct cases on a conditional fee basis on behalf of the ultimate client/consumer.

If not TSOs are there other bodies that might fit the bill? While there is no network of local consumer associations as such there are a number of bodies such as law centres, CABs regional advice agencies and issue specific charities which might wish to offer themselves as representative bodies. Many will have a national and local reach. However, they differ in their resources and cannot be said to be capable of being a network of representative bodies offering the same access to justice to the public in each and every area of the country. Again, very few local organisations (apart from law centres) employ lawyers and those lawyers are unlikely to have the resources to bring large civil actions. It seems that private law firms would have to be engaged on the same basis as above.

The identification of representative bodies does not produce an answer to the question who funds the cases? While, the law firms will be prepared to act on conditional fees in appropriate cases this still leaves the liability for expenses (expert fees; forensic accountants etc) which must be met and the potential liability for another parties costs if the case is wholly or partly unsuccessful. As discussed above the insurance market is not attracted to ATE cover in group cases. Third Party Funders might wish to be involved. As discussed at the European level in relation to competition damage claims a Contingency Fee Legal Aid Fund to indemnify



claimants and instruct lawyers in return for a top slice from damages has its attractions and is being discussed at EU Commission level.<sup>3738</sup> This model has the merit of acting in the public interest but without calling on the public purse (except for pump priming) but would almost certainly require legislation to introduce it.<sup>39</sup>

In so far as all the models suggested above will inevitably involve entrepreneurial law firms acting under conditional fees it does suggest that consideration should be given to firms acting not just as agents for agents (the representative bodies acting for consumers) but directly for consumers. This would mirror the US approach of private attorneys' general enforcing public good through private action<sup>40</sup>. So far this approach has not been attractive to policy makers and the public because of the fear of a 'compensation culture' and law firm activity has been limited for funding reasons. However, in our view such an alternative cannot be excluded from the mix of possible outcomes.

#### **4.10 Ombudsmen as Representative Bodies**

Ombudsmen are increasingly becoming more active and creative in dispute resolution. Examples of such active agencies are the ACCC in Australia, the Nordic Consumer Ombudsmen and the public sector Ombudsmen in the UK who in their consideration of complaints can also recommend remedies that consider the effect of a practice or decision on others. This issue is explored further in the analysis of restorative justice measures contained in Section 5 of this report.

Further, the Nordic Consumer Ombudsmen (Denmark, Norway, Sweden & Finland) in different ways are empowered to act as representative bodies on behalf of groups of victims in civil courts. This approach has much to commend it and would allow the public interest to be acknowledged in limiting litigation costs; encouraging mediation and adopting opt in or opt out arrangements as appropriate. Certainly, a consumer ombudsman with full or partial protection against adverse costs if the case is won would be in a very powerful position to negotiate a settlement with a defendant company or companies. However, such a development in England would require

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<sup>37</sup> See A.Riley & J.Peysner, 'Damages in EC Antitrust Actions: Who Pays the Piper', *European Law Review*, 2006, pp 748-761

<sup>38</sup> See footnote 6

<sup>39</sup> There is some suggestion that the Legal Services Commission may have the powers to offer such an approach.

<sup>40</sup> See article referred to in footnote 32

legislative change and changes in the court rules and, perhaps, a change in policy approach.<sup>41</sup>

#### 4.11. A Word of Caution

The debate about maximising the numbers of ‘victims’ who engage (or in ‘opt out’ are engaged) carries an implicit assumption that it is inherently appropriate to bring a case where there is injury and citizens can obtain redress. While this must be broadly correct it has to be set against societal concern over excessive litigation *and* excessive legal costs where there might be more appropriate methods available (in some cases restorative justice) or, in the absence of a broader principle, the loss to each individual even if aggregated into a large figure is minor in terms of each individuals economic well being. An example of this is the football shirts case noted above. Each individual was injured to a relatively small extent (the difference between the price influenced or not influenced by a cartel) but it was in society’s interests for the case to be brought as a further pressure, over and above regulatory penalties, to curb anti-competitive behaviour.

This concern is reflected in the Overriding objective under the Civil Procedural Rules which states at rule 1 (1)& (2):

- (1) *These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.*
- (2) *Dealing with a case justly includes, so far as is practicable –*
  - (a) *ensuring that the parties are on an equal footing;*
  - (b) *saving expense;*
  - (c) *dealing with the case in ways which are proportionate –*
    - (i) *to the amount of money involved;*
    - (ii) *to the importance of the case;*

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<sup>41</sup> For a discussion of the Nordic Ombudsmen (pp 27 to 35) and more generally the private/public enforcement debate see C. Hodges *The Reform of Class and Representative Actions in European Legal Systems*, Hart, Oxford, 2008.

- (iii) *to the complexity of the issues; and*
- (iv) *to the financial position of each party;*
- (d) *ensuring that it is dealt with expeditiously and fairly; and*
- (e) *allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.*

This rule, particularly at 1(2) (c) and (e) recognises that resources of the parties and the court should be used efficiently and proportionately and that justice does not demand access to the courts at any cost. This view is likely to be reflected in case management by judges in group litigation who may impose cost sanctions against wasteful litigation.

All things being equal it might be assumed that if procedure and a cost regime could be designed to ensure that consumers with more than minor claims could join together to bring cases and they were completely or very substantially protected against paying their share of another party's costs then they would bring such a claim. This assumes that consumers are economically rational agents, in other words, they will place a 'good bet'. However, it is increasingly recognised that individual actions have a strong psychological component which will influence their behaviour as the following extracts demonstrate:<sup>42</sup>

"Theories of choice are at best approximate and incomplete...choice is a constructive and contingent process. When faced with a complex problem, people...use computational shortcuts and editing operations"...."the evidence indicates that choices are orderly, although not always rational in the traditional sense of the word."

This statement of what is known as Prospect Theory proceeds from a central recognition of the non mathematically rational basis for much of human decision

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<sup>42</sup> Extracts from P.L.Bernstein *Against the Gods: The Remarkable Story of Risk*, John Wiley, New York, 1996 at pages 270 to 278 and 294 referring to numerous papers by Khaneman & Tversky. There is an avalanche of recent literature supporting these insights.

making: it puts psychological factors as the central determinant rather than a mere variant of utility based thinking. However, this remains in the context that if decisions are orderly then they must be to an extent predictable. The arguments advanced by the theory is that the attitude of individuals involved in pricing, game playing or negotiation is not an attempt to maximise gains but their need to avoid losses. In one example given you go to a theatre having purchased a ticket for \$40. On arrival at the box office you discover that you've lost the ticket. Would you buy a replacement ticket or miss the show and save \$40? Alternatively, you go to a theatre with \$80 in your pocket intending to purchase the tickets for \$40. On arrival at the box office you discover that you have lost \$40. Would you spend the remaining \$40 on a ticket or miss the show and save \$40? Classical rational theories of pricing behaviour suggest that an individual's attitude to each dilemma should be the same as the mathematical issues are identical. In fact empirical research shows that more people would spend to buy a ticket if they never had one: there is more concerned about a loss of an already acquired item than the loss of the spending power.

“...this process is related to the ‘endowments effect’ to describe our tendency to set a higher selling price on what we own (are endowed with) than what we would pay for the identical item we did not own it...”.in one experiment, some...students were given Cornell coffee mugs and were told they could take them home; they were also shown a range of prices as to set the lowest price at which they would consider selling their mug. Other students were asked the highest price they would be willing to pay to buy a mug. The average owner would not sell below \$5.25, while the average buyer would not pay more than £2.25.”

The combination of rational economic factors (fear of costs that in practice might not be capable of being entirely eliminated); opportunity cost (there are better things to do in life than litigate); and these psychological issues suggests that in any system, other than one that is ‘clientless’ there is a cap on the involvement of consumers even though those that have legitimate grievances which are potentially compensatable.

One criticism of USA class actions is that they can sometimes feel like ‘clientless’ litigation with the lawyers for the class squaring up against the defendants with little involvement by the claimants. An argument against this approach might be that it overstates the extent that individuals might, all things being equal, wish to be

involved in litigation.<sup>43</sup> Those calling the shots are the lawyers who earn their living by conducting litigation and are likely to have a different attitude to bringing cases. Policy in the UK needs to take this into account.

#### **4.12. Collective Action and Restorative Justice**

The discussion above which focuses on the 'opt in/opt out' debate raises a difficulty of how either type of procedure might fit with the concept of restorative justice either as an alternative to litigation or as a means of resolving a dispute in litigation. Restorative justice presupposes a debate between the parties seeking resolution: a true meeting of minds. This is likely to be difficult in an action involving large numbers of consumers (which could be either opt in or opt out). Even more so in the generally favoured 'opt out' or class model a substantial part of the group of consumers are contingent only and not currently active in resolving the dispute. As the lawyers are not parties they cannot be involved in restorative justice except as agents: if 'opt out' leads to less involvement by claimants then the prospects for an opening for restorative justice is diminished.

#### **4.13. Training and Organisational Needs**

The approach outlined above suggests a different set of priorities from regulators in this area away from an essentially 'neutral' prosecutorial approach to one of active engagement with dispute resolution. This will require a development of a skill set to deal with these new challenges. There will also be a need to examine the relationship between different elements of regulatory organisations responding to the needs of, for example, restorative justice. The relationship between, for example, trading standards and their in house lawyers, often in a service level agreement, will need to be responsive to a different set of challenges, in particular, the need to involve the consumer.

#### **4.14. A Provisional Conclusion on Parallel Tracks: A Great Deal of Work Needs to Be Done**

While the new legislative machinery for consumer redress offers new powers the most effective way for these powers to be used and how they mesh with the potential

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<sup>43</sup> The counter argument is that 'private attorneys' general' play an important role in policing malefactors and if it is impractical to expect clients to take the lead then lawyers should,

for restorative justice and civil actions for groups is far from clear. There is a need to generate models of harm to groups of consumer which merit a collective response and to stress test different approaches to their resolution in discussion with stakeholders. It is likely that some of these approaches will not be viable within the existing statutory and regulatory framework.

## 5. APPLYING RESTORATIVE JUSTICE TO CONSUMER CASES

The basic principles of restorative justice are 'repair of harm' and mediation or contact between victim and offender which can lead to:

- An apology
- A chance for victims to get answers to questions
- A chance for victims to tell offenders the real impact of their crimes and for offenders to understand this impact.
- A chance to achieve some form of reparation
- A chance for victims to achieve some form of closure from events

The ideal for effective restorative justice is that offenders are held to account for what they have done and realise the harm that they have caused. In successful restorative justice victims are able to confront offenders make sense of what has happened and move on with their lives. Successful restorative justice also avoids the escalation of legal justice and its associated costs and delays.<sup>44</sup>

This section of the research considers the read across from restorative justice in criminal and other cases to civil cases and consumer redress.

### 5.1. Restorative Justice and Criminal Justice

Restorative justice is routinely used in criminal justice around the world as a means of achieving closure for victims of crime and giving offenders the motivation and insight to stop offending. Restorative justice was introduced into the UK's youth justice system via the *Crime and Disorder Act 1998* and has subsequently been introduced into the adult criminal justice system, although its use is not compulsory. As of July 2007, thirteen of the 42 local criminal justice boards had reported some adult restorative justice delivery.<sup>45</sup> An evaluation of restorative justice schemes carried out by the Ministry of Justice<sup>46</sup> concluded that;

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<sup>44</sup> Marshall, T.F., (1999) '*Restorative Justice: An Overview*', Home Office

<sup>45</sup> 'Restorative Justice', House of Lords, 17 July 2007, Column 126

<sup>46</sup> Shapland, J., Atkinson, A., Atkinson, H., Chapman, B., Dignan, J., Howes, M., Johnstone, J., Robinson, G., and Sorsby, A., (2007) '*Restorative Justice: the views of victims and*

- 78% of victims who took part in RJ conferences said they would recommend it to other victims
- 90% of victims who took part in an RJ conference received an apology from the offender in their case; as compared with only 19% of victims in the control group
- Only 6 victims, and 6 offenders, out of 152 offenders and 216 victims interviewed, were dissatisfied with the RJ conference after taking part
- Around 80% of offenders who took part in the RJ conference thought it would lessen their likelihood of re-offending.
- Victims who had been through a Restorative Justice conference were more likely to think the sentence the offender had received was fair, than victims in the control group who did not participate in RJ.

The UK research mirrors the belief widely held around the world that restorative justice, when carried out properly can have a positive effect on re-offending. This has been demonstrated in a number of research studies (see for example Sherman & Strang 2007, Hayes 2005 and Nugent, Williams and Umbreit 2003) although it should be noted that success rates vary between offender groups and that different models for resolving the conflict can be employed. Victim-offender mediation, for example can be carried out either directly (via face to face meetings) or indirectly (where the victim and/or offender do not wish to meet and the mediator conveys messages between the two parties to reach agreement). Family Group conferencing can involve the extended family so that the offender has support to address challenging behaviour. Restorative Conferencing involves intervention by a trained facilitator to enable a conflict to be resolved and for the offender to find a way of making reparation to the victim.

While restorative justice is most often used in crime and criminal justice there is no reason why it cannot be used in civil and other cases. In fact restorative justice processes have already been implemented in schools, workplaces, care homes and health services where the principles can be readily applied. Restorative Justice Principles are also employed in some ADR and complaint investigation processes

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*offenders, The third report from the evaluation of three schemes'*, Ministry of Justice/University of Sheffield



such as Ombudsman schemes where the aim is to put victims back into the position they would have been in had the fault not occurred and to allow the complainant to find some closure from events. The public sector Ombudsmen schemes, for example, routinely seek the views of complainants when considering a remedy and the 'injustice' caused to the complainant is a significant factor in determining the appropriate remedy.

## **5.2. Restorative Justice in the Health Service**

Restorative practices have been used in the health service with mediation in particular being used as a means of conflict resolution and to prevent the escalation of clinical negligence cases.<sup>47</sup> Turner's (2006) analysis of health mediation cases identified how meetings between NHS staff and patients and their representatives can often lead to a satisfactory resolution to cases that might otherwise escalate. In one case involving a man whose wife died after what he saw as a series of errors and negligence by her GPs, meetings between the widower and the GPs facilitated by a mediator who had first met each party separately, resulted in the widower deciding not to pursue the complaint through the NHS Complaints Procedure or by other action.<sup>48</sup> The use of mediators in health service complaints provides for both sides in a dispute to understand the position of the other side and for cases to be resolved without the need for litigation. In its 2007 annual report the National Health Service Litigation Service (NHSLA) reported that "96% of clinical negligence cases handled by the NHSLA are resolved through negotiation, mediation and other forms of alternate dispute resolution."<sup>49</sup>

## **5.3. Restorative Justice in Schools**

Research has shown that restorative justice can be used effectively in schools to deal with problems ranging from bullying to poor classroom discipline. In Australia, restorative justice schemes were introduced at Queanbeyan South Primary School in

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<sup>47</sup> Turner, A., and Eaton, R., (2004) '*Towards a National Health Service Mediation Scheme*', West Kent NHS and Social Care Trust

<sup>48</sup> Turner, A., (2006) '*Health Mediation Case Studies which worked*', Kent Health Mediation Service

<sup>49</sup> NHSLA, (2007) '*The National Health Service Litigation Authority: Report and Accounts 2007*', NHSLA

New South Wales to deal with a range of problems<sup>50</sup>. The school was struggling with bullying and anti-social behaviour and so introduced a restorative justice scheme to deal with this. Pupils were asked to reflect on their behaviour and the harm that they had caused to others, forcing students to meet face-to face with their victims and involving staff as mediators to identify solutions. Staff worked with a restorative justice script, the last question of which asked the offender 'What do you think you need to do to make things right?' This might be an obvious application of restorative justice, dealing as it does with a crime that in some circumstances is similar to the assaults and harassment dealt with by the criminal justice system. But the school also used restorative justice in a case where children had sold fake raffle tickets to senior citizens and were required to pay back the money and perform gardening for an elderly woman as restitution. A similar approach has been applied in the UK.

Restorative Principles are being employed by Lewisham Council in partnership with Lewisham Action on Mediation (LAMP). The work of the Lewisham Restorative Approaches Partnership has been instrumental in applying restorative principles in five Lewisham schools as a tool for dealing with conflict within them. In 2004 the Scottish Executive established a 30-month project in Restorative Practices in three local authority areas. The pilot project was later extended to 2008. Restorative practices were applied across 18 schools and the report on the project concluded that the atmosphere in the primary and special schools became calmer and pupils more positive about the school experience. A small number of schools also "raised attainment and in several there was a decrease in exclusions, in-school discipline referrals and out of school referrals" the report also concluded that "there was clear evidence of children developing conflict resolution skills."<sup>51</sup> .

#### **5.4. Restorative Justice in Ombudsmen's Schemes**

Ombudsman's schemes are now an established feature of consumer redress and the alternate dispute resolution system in the UK. The National Consumer Council estimates that in 2006/2007 the combined efforts of the various Ombudsmen's

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<sup>50</sup> Porter, A. J. (2005) 'Restorative Practices at Queanbeyan South, An Australian Primary School'

<sup>51</sup> Kean, J., Lloyd, G., McCluskey, G., Riddell, S., Stead, J. and Weedon, E., (2007) *'Restorative Practices in Three Scottish Councils: Final Report of the Evaluation of the first two years of the Pilot Projects 2004-2006'*, Universities of Edinburgh and Glasgow

schemes resulted in the resolution of nearly 150,000 cases.<sup>52</sup> Public sector Ombudsmen operate under statute and are funded by the taxpayer while private sector Ombudsmen (mostly operating in the goods and services sector) are funded by industry participants who elect to join a scheme covering their industry. However, both types of scheme represent a move towards a more consensual form of dispute resolution with the Ombudsman employing an inquisitorial rather than an adversarial investigative process. The emphasis is often on fact-finding prior to the Ombudsman reaching a decision on the complaint. But the process allows for the complainant to put forward their complaint as they see it and provide detail on the effect that the events complained of have had on them. In public sector cases the public body that is being complained of is normally informed of the complainant's version of events and is given an opportunity to respond and address the alleged fault and harm. Where the Ombudsmen depart from 'pure' restorative justice is in the respect that they decide the appropriate remedy for each complaint and while the views of the complainant are considered, the Ombudsmen are not bound by them. The public sector Ombudsmen can, therefore, determine that a complaint has been settled and that the offending public body has offered an appropriate remedy even though the complainant may disagree and be unwilling (or unable) to accept the Ombudsman's judgement on their complaint. But despite this issue relating to the final decision, many restorative principles are employed by the public sector Ombudsmen (and the Housing Service Ombudsman) and their investigative practices provide some indication of how restorative practices can be applied to an alternate dispute resolution setting enacted by legislation.

The Local Government Ombudsmen investigate maladministration by public authorities (mostly councils but also national parks authorities and the Environment Agency in respect of flood defences) using powers granted under the *Local Government Act 1974*. Complaints can be made by members of the public about any aspect of local authority decision-making and where the Ombudsmen find fault by the authority they "seek a remedy that would, so far as possible, put the complainant back in the position he or she would have been in but for the fault."<sup>53</sup> When making a complaint to the Ombudsman complainants are specifically asked what they believe the council should do to put things rights. Apologies are a common outcome of

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<sup>52</sup> Brooker, S., (2008) '*Lessons from Ombudsmania*', National Consumer Council

<sup>53</sup> Redmond, T., Thomas, P. and White, J., (2005) '*Remedies: Guidance on Good Practice 6*', London: The Commission for Local Administration of England

Ombudsmen's cases and complaint forms which include the complainant's proposal for remedying their complaint and their view of what has happened and how it has affected them are usually sent to the authority when a complaint investigation is initiated. The Ombudsmen also take account of the views of complainants in determining a remedy for complaints although they are not bound by the complainant's view.

Examination of casework published by the Ombudsmen demonstrates how restorative practices are implemented in their investigative work. The following examples contain elements typical of Ombudsmen's casework. The names of the complainants used here are not their real names<sup>54</sup>:

### **Case Example - Incorrect Advice about Building Regulations**

In a case involving incorrect advice and a failure to carry out building regulations the Ombudsman recommended that a council should reimburse 'Mr and Mrs Archer' for the reasonable costs of the work they carried out following the Council's incorrect advice. The Council agreed to carry out this recommendation in consultation with Mr and Mrs Archer regarding the costs. The Council also agreed to pay Mr and Mrs Archer £500 for the inconvenience arising from the incorrect advice and the Ombudsman recommended that the Council should pay Mr and Mrs Archer a further £500 for their time and trouble and the needless inconvenience that arose.

(Ombudsman's Report reference 04/C/16327)<sup>55</sup>

### **Case Example - Planning Special Educational Needs**

In an education case there were failings in the way a council dealt with the transfer of the complainant's daughter who had Special Educational Needs (SEN) and failings in the issuing of her SEN statement. The Ombudsman identified a number of serious faults concluding that as a result of the failures the complainant's daughter 'Helen' was denied a place at her preferred school for just over a term, being educated at home during that period. The Ombudsman recommended that the Council should pay her father 'Mr Parry' £1,000, and in discussion with Helen, purchase educational assistance to the value of £500 to help her make up the schooling she had lost and should review its procedures for dealing with children with a statement of special

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<sup>54</sup> The Local Government Act 1974 requires that the Ombudsmen report anonymously

<sup>55</sup> Redmond, T., Thomas, P. and White, J., (2006) *Local Government Ombudsman: Digest of Cases 2005/06*, London: The Commission for Local Administration of England

educational needs who were transferring to secondary school, to ensure that their transfers were dealt with in accordance with the law and the *Special Educational Needs Code of Practice*.

(Ombudsman's Complaint reference 03/B/8725)<sup>56</sup>

Although not a formal restorative justice process where both sides in the dispute meet as a matter of course, each case involved the complainant in the implementation of the remedy, with the Council being required to consult Mr and Mrs Archer about the costs of their works and direct discussion with Helen (Mr Parry's daughter) about the educational assistance that she would need to make up for her lost schooling. In each of the above cases the nature of the events meant that it would be impossible to put the complainant back in the position that they would have been in had the maladministration not occurred and so the Ombudsman has recommended an element of financial compensation. Recognition of the time, trouble and inconvenience to which the complainant has been put by way of financial compensation can often go some way to helping a complainant believe that they have been listened to and that an attempt has been made not only to repair the harm caused to them by way of a remedy but also to address their inconvenience. This can help them to achieve closure.

The Independent Housing Ombudsman (IHO) investigates complaints about registered social landlords (RSLs). Unlike the other public sector Ombudsmen the IHO has powers to make orders as well as recommendations but also has powers to adjudicate on the basis of the papers, adjudicate with a hearing, conciliate, and mediate and to make an early neutral assessment. Restorative Justice has been proposed as part of the new regulatory system for social housing. The IHO has endorsed this proposal explaining that this would, for example, allow tenants to call their landlord to a public meeting chaired by the IHO at which tenants could air their grievances and hear their landlords' responses. At the conclusion of the meeting all parties would agree an action plan and this would be enforceable by the IHO under existing or extended powers.<sup>57</sup> Like the other public sector Ombudsmen the IHO asks the complainant from the outset to identify what action they believe is necessary

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<sup>56</sup> Redmond, T., Thomas, P. and White, J., (2005) *Local Government Ombudsman: Digest of Cases 2004/05*, London: The Commission for Local Administration of England

<sup>57</sup> Housing Ombudsman Service, (2007) *Annual Report and Accounts 1 April 2006 – 31 March 2007*, London: Independent Housing Ombudsman Limited

to remedy their complaint, employing restorative practices by allowing complainants to have a stake in identifying the appropriate remedy for their complaint.

The Parliamentary and Health Service Ombudsman investigates complaints about government departments, agencies and some public bodies as well as poor treatment or service provided through the NHS in England. Where the Ombudsman finds fault the body subject of the complaint is asked to provide an explanation and acknowledgment of what went wrong and to take action to put the matter right, including providing an apology. Where serious faults are found, organisations are asked to make changes to their procedures to prevent others being similarly affected and may be asked to pay compensation for any financial loss, worry or inconvenience that a complainant has suffered.

Complaints to the Public Sector Ombudsmen, therefore provide some indication of how restorative justice principles can be implemented by a regulator following investigation of a complaint. While the resolution of complaints may not be a 'pure' restorative practice as ultimately, the Ombudsman makes the decision on what is an appropriate remedy and agreement between both sides may not be achieved, adjudication by the Ombudsman allows both sides input into the decision-making process and the opportunity to put their views forward. If the additional powers for enforcers contained in the *Regulatory Enforcement and Sanctions Bill* are implemented the model provided for by Ombudsmen's schemes provide some practical guidance on how restorative principles might be applied to the investigation and enforcement of consumer cases.

## **5.5. Restorative Practices and Consumer Redress Cases**

In the House of Lords' debate on Restorative Justice, Lord Thomas commented on the effectiveness of restorative justice when compared with traditional forms of criminal justice, concluding that the aims of reduction of crime, rehabilitation of offenders and the making of reparation by offenders to their victims contained within the *Criminal Justice Act 2003* had not been met. Lord Thomas commented that:

"It is interesting to compare the aims of that Act with the Macrory report published by the Better Regulation Executive a year ago. That report considered the purposes of sanctions for regulatory offences. The first aim was not punishment but changing the behaviour of the offender. The second

aim was to eliminate any financial gain or benefit from non-compliance. The third aim was to be responsive and to consider what is appropriate for the particular offender. The fourth aim was for sanctions to be proportionate to the nature of the offence and the harm caused. Your Lordships will see that in the aims set out in the report, there is no mention of punishment simply for its own sake. Unfortunately, the report's recommendation that restorative justice techniques be applied in this field has not been carried into the Regulatory Enforcement and Sanctions Bill introduced on 8 November."

However, despite Lord Thomas's comments, the provisions of the *Regulatory Enforcement and Sanctions Act 2008* do allow for the application of restorative practices in consumer cases. The Act contains provisions allowing for the introduction of fixed financial penalties, for enforcers to accept undertakings from offenders, for enforcers to use discretionary measures which could provide for restorative practices to be employed by enforcers. What will determine how effective these measures are in contributing to the development of a restorative enforcement culture in consumer cases is how they are used by enforcers and regulators. It is accepted in restorative criminal justice practices that the aftermath of a crime cannot be fully resolved for the parties without facilitating their personal involvement and that justice measures need to be flexible and responsive to the circumstances and personal needs relevant to each case.<sup>58</sup> Adopting the same principles in consumer protection cases would require a more flexible approach on the part of enforcers and the *Regulatory Enforcement and Sanctions Act 2008* would appear to reflect this aim. In particular, the enforcement undertakings and discretionary requirements provide scope for enforcers to require traders and businesses to take steps that will repair the harm their actions have caused to consumers. Given the success of restorative principles in some other non-criminal justice settings its application to consumer cases could provide for more effective consumer redress by providing for reparation and a more consumer-orientated approach to enforcement rather than an enforcement regime based on punitive rather than corrective measures.

Research by the National Consumer Council identified that there are in the region of 202,257 consumer complaints made annually in areas where there is no formal independent redress mechanism available by way of an Ombudsman's scheme.<sup>59</sup>

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<sup>58</sup> Marshall, T.F., (1999) '*Restorative Justice: An Overview*', Home Office

<sup>59</sup> Brooker, S., (2008) '*Lessons from Ombudsmania*', National Consumer Council

This includes key consumer complaints areas of second-hand cars, personal computers, software and services, large domestic appliances and the audiovisual industry. While some of these areas might be dealt with by way of a complaint to TSOs, this brings with it the problem that some cases are discontinued as not being in the public interest, cases are enforced in line with local trading standards enforcement priorities which may not reflect consumer need, and prosecutions that are successful can still result in a dissatisfied consumer who does not directly receive redress for their complaint. While an offender might be convicted and fined the consumer may not receive any direct remedy and so may still be unable to achieve closure from the experience and could retain a sense of injustice. In addition complainants might be aggrieved and frustrated at the time, trouble and expense spent on pursuing a complaint.

While prosecution may be a practical means of dealing with individual offences it is an inefficient means of dealing with trade malpractice. Fines levied in individual cases may not provide a sufficient deterrent to prevent future wrongdoing and do not address any harm incurred by others in a similar position who may not have directly raised a complaint. As in some areas of crime, offenders may simply regard fines as the cost of doing business and criminological theory (see for example Lemert 1951 and Merton 1968) also explains how many business offenders do not see themselves as operating unlawful or criminal practices that need to be modified even when prosecuted. Restorative justice may, therefore, provide a means of changing business behaviour by ensuring that business becomes aware of the impact of their actions on consumers and the consequences of business practices that breach regulations in much the same way that restorative conferencing requires burglars to see their victims as individuals whose lives have been severely affected as a direct result of their actions. The application of restorative practices to business regulation and compliance is possible where legislation allows enforcement authorities the tools to resolve complaints in addition to or as part of their enforcement or regulatory activities. However it may only be possible to apply restorative practices to certain cases or complaints and impractical to apply the restorative principles in their entirety to consumer protection casework.

## **5.6. Securing an apology**

A core feature of restorative justice is that victims should receive an apology from the offender. In Ombudsmen's cases, mediated cases and many forms of ADR this is



easy to achieve as it can form part of any recommended remedy or settlement of a complaint. But in those consumer cases where there is no directly identifiable offender (e.g. a consumer complains about a distance selling or other scam but it is not possible to identify a UK-based offender who could be the subject of enforcement action) or where a particular business practice contravenes legislation and it is enforced by trading standards staff without the need for a specific consumer complaint, securing an apology for a specific consumer or group of consumers may be difficult to achieve. As an example, trading standards staff are responsible for enforcing regulations on excessive packaging<sup>60</sup>. But in some cases (e.g. whisky bottles, Easter eggs) excessive packaging has become an established part of the industry and is used mainly for brand identification. In these cases, consumers may accept the additional packaging as simply being part of the product and so do not pursue a consumer complaint. A defence also exists allowing retailers to defend excessive packaging where it is what the customer wants or where it is required for the purposes of marketing.<sup>61</sup> However, trading standards might seek to pursue the matter even where there is no complainant to receive an apology and so this restorative principle might not be achieved. It is also true that under current legislation, prosecutions are taken for breaches of legislation where the outcome might be 'limited' to a fine and/or prohibition on further trading. Where trading standards or another enforcer is also responsible for facilitating the restorative practice this might also be a factor that causes difficulties in securing an apology. To do so might be seen by traders as an admission of guilt that should be avoided if any later legal action or prosecution is to be contested. This contrasts with restorative justice in criminal cases where restorative practices might take place as part of sentencing (i.e. after conviction where it is seen as part of an offender's rehabilitation.)

But there is no reason why an apology for affected consumers cannot be incorporated into the consideration of consumer cases. When deciding whether to pursue a case, the attitude of the offender and nature and circumstances of the breach are factors considered by enforcers and regulators. Certainly the Public Sector Ombudsmen regularly accept an apology and the provision of the service or

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<sup>60</sup> EU Directive 94/62/EC which was implemented in the UK in the Packaging (Essential Requirements) Regulations of 1998 and was updated in 2003

<sup>61</sup> LGA News Release, (2007) *'Packaging Laws are too weak'*, Local Government Association

benefit that should have been provided to be an acceptable remedy for a complaint.<sup>62</sup> What may be more at issue in consumer cases is not whether an apology can or should be provided, but how restorative principles can be applied to ensure that consumers are engaged with the resolution of their complaint and are provided with some form of redress appropriate to their complaint.

### **5.7. Victim-Offender Dialogue**

Braithwaite describes restorative justice as “a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.”<sup>63</sup> In discussing the implementation of restorative justice in criminal justice cases, attention often rests on the meeting between offender and victim and as a result the public perception of restorative justice is mostly based on this issue, the opportunity for a victim to meet the offender and make the offender understand the impact and consequence of their actions. This is in part because the focus in criminal justice is for victims to obtain answers and for offenders to face up to their crimes and begin the process of rehabilitation, thereby achieving the criminal justice system aim of reducing crime by preventing re-offending. But Llewellyn has argued that “restorative processes are founded on a conception of justice as fundamentally concerned with restoring relationships”<sup>64</sup> There need not be any face-to-face meeting between victim and offender but as long as there has been some mechanism through which the victim or ‘wronged party’ is able to communicate with the offender, even if via a third party or mediator, restorative principles could be said to have been applied. This may be more important in consumer cases where the consumer may have little choice but to continue to interact with certain traders, businesses or suppliers of goods and services (e.g. utilities providers) and so an ongoing relationship may exist which is not the case between burglar and victim.

In consumer cases, this dialogue might take place via the making of a complaint where the consumer’s views are presented to the offender or might be implemented

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<sup>62</sup> Redmond, T., Thomas, P. and White, J., (2005) *‘Remedies: Guidance on Good Administration’*, London: The Commission for Local Administration of England

<sup>63</sup> Braithwaite, J., (2002) *‘Restorative Justice and Responsive Regulation’*, Oxford University Press

as part of the remedy for example where a company is required to write to a consumer explaining what has happened and how it might be remedied.

## 5.8. Achieving Reparation

Potentially it is in the area of achieving reparation for consumers that restorative justice can best be applied to consumer cases. The core values of restorative justice are to secure healing for the victim, responsibility on the part of offenders and making amends for the offence. In consumer cases, this can be achieved as long as enforcers and designated regulators have the power to make binding awards and pursue negotiated settlements for complaints. Where legislation provides that regulators can decide not to take enforcement action if they can achieve compliance through negotiation and settlement with potential offenders; this option could be used by applying restorative principles. Ombudsmen cases provide one model of this within the UK. Where an organisation takes action that the Ombudsman considers to be appropriate he may discontinue an investigation. Legislative changes introduced in 2007 mean that the Local Government Ombudsmen, Parliamentary Ombudsman and the Health Service Ombudsman, for example can now mediate in disputes in addition to securing reparation via local settlements.<sup>65</sup> But there are other regulators where this is the case and studies of 'negotiated compliance' (Hutter 1997<sup>66</sup> and Hawkins 2002<sup>67</sup>) demonstrate how the practice can sometimes achieve better settlements and resolution than might have been achieved had an issue been pursued to enforcement (or court action).

A model for negotiated settlements exists within Australian consumer protection legislation. The Australian Competition and Consumer Commission (ACCC) has a power to use enforceable undertakings to formalise their decisions and to forego enforcement litigation if offenders agree to correct their misconduct and comply in the future. Parker (2004) argues that enforceable undertakings represent a means for

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<sup>64</sup> Llewellyn, J., (2002) *'Dealing with the legacy of native residential school abuse in Canada: Litigation, ADR and restorative justice'*, University of Toronto Law Journal

<sup>65</sup> Regulatory Reform Order 2007 No 1889 made under the Regulatory Reform Act 2001 allows the Ombudsman to appoint and pay a mediator 'or other appropriate person' to 'assist' in the conduct of an investigation.

<sup>66</sup> Hutter, B., (1997) *'Compliance: Regulation and Environment'*, Clarendon Press

<sup>67</sup> Hawkins, K., (2002) *'Law as Last Resort'*, Oxford University Press

applying restorative justice as an alternative to traditional regulatory enforcement action because the undertakings can facilitate the agreement of all parties involved in wrongdoing to correct a breach of regulations and prevent any further breaches.<sup>68</sup>

Parker cites as examples of enforceable undertakings; “the selling of cots, sunglasses, bicycles and other goods that do not meet safety standards”<sup>69</sup> and observed that most offences enforced by the ACCC are civil offences rather than criminal prosecutions. Australian legislation allows that the ACCC can accept undertakings after it has begun an investigation and will generally only accept an undertaking if there is evidence of a breach that would justify legal action or prosecution.

Parker identifies the following criteria in the ACCCs decisions on whether to pursue enforceable undertakings:

1. The impact of the alleged breach on third parties and the community at large;
2. the type of practice
3. the product or service involved
4. the size of the corporation or corporations involved
5. the history of complaints against the corporation and complaints concerning the practice complained of
6. the nature of the product or industry and any relevant previous Court or similar proceedings
7. the cost-effectiveness for all parties of pursuing an administrative resolution instead of Court action
8. prospects for rapid resolution of the matter
9. the apparent good faith of the corporation

This provides possible criteria for achieving reparation via restorative justice. The provisions in the *Regulatory Enforcement and Sanctions Act 2008* allow for enforcers to accept undertakings<sup>70</sup> although it is not currently clear whether these would be enforceable by the courts. But in practice, enforcers take such action already on an

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<sup>68</sup> Parker, C., (2004) ‘*Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission’s Use of Enforceable Undertakings*’, *Modern Law Review* 67(2), Blackwell

<sup>69</sup> Parker, C., (2004) ‘*Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission’s Use of Enforceable Undertakings*’, *Modern Law Review* 67(2), Blackwell

<sup>70</sup> Section 50 of the Act provides a power for enforcers to accept undertakings

informal basis as prosecution by trading standards is often a last resort with the aim being to secure compliance and punish offenders rather than achieving reparation for aggrieved consumers.

The *Regulatory Enforcement and Sanctions Act 2008* provides a power for enforcers to issue discretionary requirements which restore the position to what it would have been had the offence not occurred<sup>71</sup> and these could be used as a practical means for remedying complaints according to restorative principles. As mentioned above, the aim of remedies in Public Sector Ombudsmen cases is to put the complainant back in the position they would have been in had the fault not occurred. Where this is not possible compensation is often recommended to reflect any inconvenience or loss and the time and trouble suffered by the complainant.

### **5.9. Closure for Victims**

While it may be difficult for some consumers to achieve closure from their complaints it is possible to apply the restorative principle of achieving an end to the complaint and ensuring that the complainant is satisfied that all issues have been dealt with so far as is possible. However this is not currently the role of enforcement activity and so one difficulty with this principle is that it requires a significant change in the role of enforcers and regulators and may require a cultural change in how complaints are investigated and enforcement decisions taken.

The extent to which a complainant achieves closure can depend on the circumstances of the complaint and the action taken to resolve the complaint. Many complainants seek to know the reasons why something has happened that affects them. But in some areas of consumer law it may simply be the case that business practices have developed on a cost-benefit basis which makes it more economical to ignore or circumvent legislation than to comply with it and any possible negative impact on consumers may, therefore, be considered to be minimal, may be ignored or may not be considered to be a priority for the business. While closure for consumers may not be possible to achieve what might be possible is a mechanism by which consumers are informed that the issue has been resolved and similarly affected consumers have also received redress. Product recall notices provide one means of doing this, where a company recognises (or is forced to recognise) that a

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<sup>71</sup> Section 42 of the Act

product will affect all consumers and provides a notice of the action it is taking to address the harm to all purchasers.

#### **5.10. Provisional Conclusions**

While the principles of restorative justice can be applied to consumer cases it is essential that the application is part of a legal justice system rather than an alternative to it. Examination of the practice of restorative justice highlights that it requires participation from both the offender and the victim and in consumer cases this means that both the trader that is the subject of the complaint and the consumer who makes the complaint must engage with the system if it is to work effectively and achieve consumer redress. There are undoubtedly some cases (or types of complaint/case) for which restorative justice is inappropriate and where the full range of principles cannot be employed and in these cases enforcers should retain the option to move to formal prosecution action even though this may not provide full redress for the consumer.

The application of restorative justice in criminal justice cases is victim-centred with the emphasis on meeting or dialogue between victim and offender and on allowing the victim to gain answers and achieve closure. This is impractical in the majority of consumer cases due to difficulties in identifying an offender in some cases and the lack of incentive for traders and companies to meet with consumers in others. But if mediation between the parties can be achieved as a possible step to avoid prosecution or to remedy a complaint without the need for prosecution this would seem to be a reasonable mechanism for restorative principles to be applied in consumer cases. There are, however, possible problems in enforcers being part of the restorative process as well as the enforcer who may escalate the matter to prosecution if restorative attempts fail. Making enforcers effectively, judge, jury and executioner could impact on the take-up of restorative options such as conferencing.

However, while not a pure restorative justice system, the *Regulatory Enforcement and Sanctions Act 2008* would seem to allow for restorative principles to be applied to consumer cases through the use of enforcement mechanisms that are designed to repair the harm caused to consumers (particularly through discretionary restorative notices and enforcement undertakings) rather than simply punishing offenders. But for these practices to work effectively there will need to be:

- Power on the part of enforcers and designated regulators to make binding awards
- Adoption of the principle that any remedy should be designed to put the complainant back in the position they would have been in had the fault not occurred or alternatively to consider compensation that reflects the inconvenience caused.
- Engagement with the system by both consumers and traders

What is not currently clear is how far the principles of the *Act* will be enacted in a manner that allows for restorative remedies to be pursued and whether the appeal mechanisms would allow businesses to block the application of restorative penalties. But in theory at least, there is a clear read-across from criminal justice to civil cases.

## **6. MAIN EMPIRICAL FINDINGS**

The questionnaire responses and interviews undertaken for this research have resulted in some useful data on the views of enforcers, business and consumer groups concerning how restorative justice and representative actions might apply in consumer cases. In particular we have received some useful data on the possible number of cases involved, the possible value of these cases and practical examples of cases to which restorative justice and the option for representative actions could apply. While it should be noted that business remains unconvinced that there is a need for these new measures and there does not appear to be a uniform view amongst TSOs and enforcers on all aspects of representative actions and restorative justice the data has identified a number of issues concerning the application of representative actions and consumer protection cases to consumer cases.

### **6.1. Number of Consumer Cases**

Data provided by Consumer Direct, the NCC and by the OFT in its comprehensive response has been helpful in identifying the scale of the consumer protection problem and the possible number of cases where consumers might not achieve effective redress. The NCC has identified that there are in the region of 202,257 consumer complaints made annually in areas where there is no formal independent redress mechanism available by way of an Ombudsman's scheme.<sup>72</sup> The OFT has confirmed that from January 2006 to December 2006, 695,465 complaints were recorded on the Consumer Direct Database and in 2007, a total of 819,815 complaints were recorded on the Consumer Direct database with the top three categories of complaint being:

- second hand cars bought from independent traders (41,880)
- mobile phone service agreements
- complaints about TVs

Data from the OFT's database of local authority prosecutions from the 1 April 2006 to 31 March 2007 indicates that there were 87 prosecutions in relation to second-hand cars during the period and just 17 prosecutions in relation to repairs and servicing of

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<sup>72</sup> Brooker, S., (2008) *'Lessons from Ombudsmania'*, National Consumer Council



cars. However Trading Standards Officers tell us that even where prosecutions are successful and the trader convicted, the consumer rarely receives direct compensation or redress for the harm caused to them and so consumers need to take their own civil action to obtain redress. This is discussed further below but indicates that there are significant numbers of cases where consumers do not receive redress even where enforcement action is taken. This suggests that there is evidence of need for restorative mechanisms or ADR to achieve redress for consumers or on the basis that civil actions by single individuals are ineffective then there is need for some mechanism that makes it easier from consumers to take collective action to achieve redress because even effective enforcement action and prosecution of traders does not achieve this for them.

The OFT has provided some data on cases where consumers do not receive redress. This includes:

- Problems in the double glazing domestic market (excluding new build applications) a market estimated to be worth around £1.8 billion.<sup>73</sup> The OFT's Consumer Detriment Study identified glazing products as one of the areas where consumers most often report having to put things right at their own expense.<sup>74</sup> The length of time that consumers experience problems with glazing products was also highlighted as an issue, with 25 per cent of problems with glazing products lasting over 12 months.<sup>75</sup> There were 11,885 complaints about double glazing in 2007, with more than half of these (6191) regarding substandard services;
- 11,642 complaints to Consumer Direct in 2007 about leather furniture, including 8462 regarding defective goods. (The value of the living room furniture market was estimated at £3.86 billion in 2007.<sup>76</sup>) The OFT Consumer Detriment Study noted that problems with furniture in general were considered to be completely resolved in 59 per cent of cases<sup>77</sup>, leaving around 40 per cent of problems either partly resolved or not resolved at all; and

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<sup>73</sup> Mintel 'Double Glazing: Market Intelligence' January 2004, p6

<sup>74</sup> OFT 'Consumer Detriment Study' April 2008, p48

<sup>75</sup> OFT 'Consumer Detriment Study' April 2008, p52

<sup>76</sup> Mintel 'Living Room Furniture, Market Intelligence' March 2008, p3

<sup>77</sup> OFT 'Consumer Detriment Study' April 2008, p51

- Research published by the OFT which reveals that UK consumers lose around £3.5 billion to scams every year, with an estimated 3.2 million adults falling victim to scams annually.<sup>78</sup> This research further suggested that consumers lose around £1.2 billion every year to bogus holiday clubs, £490 million to high risk investment scams, £420 million to pyramid and get-rich-quick schemes, and £260 million to fake foreign lotteries. The OFT explained that a high proportion of consumers who encounter a scam (38 per cent) do not report or talk about their experience, and less than five per cent tend to report a scam to the authorities (OFT, police, or local authority TSOs).<sup>79</sup>

As part of this research an attempt has also been made to identify the value of cases to consumers. OFT research indicates that during the 12 months to April 2008:

- There were an estimated 26.5 million problems where consumers had suffered detriment;
- Fifty-five per cent of problems resulted in a financial detriment below five pounds and only four per cent of problems led to detriment levels higher than £1,000;
- The goods or services for which consumers have reported the highest proportion of problems are telecommunications, domestic fuel and personal banking;
- The highest average financial detriment per problem is found in the insurance category, followed by home maintenance and improvements and personal banking; and
- An estimate of the overall value of revealed consumer detriment in the UK economy over the 12 month period is £6.6 billion.

(Source OFT)<sup>80</sup>

This research does not attempt to review the data contained within the OFT's Consumer Detriment report. However discussion of the level of detriment caused to consumers and the average values of that detriment during our interviews indicates general agreement that the majority of cases relate to detriment levels lower than £1,000 as indicated by the OFT's research. The main areas of complaint for trading standards officers appear to be faulty white goods and brown goods, cars and house

<sup>78</sup> OFT 'Research on impacts of mass marketed scams' December 2006

<sup>79</sup> OFT 'Research on impacts of mass marketed scams' December 2006, p.35

<sup>80</sup> OFT 'Consumer Detriment Report' April 2008

repairs. Counterfeit goods (DVDs etc.) and internet scams appear to be on the increase and this is also reflected in the data produced by the OFT. The nature of these activities is such that the detriment to consumers will generally be at the lower end of the scale (i.e. under £1000) by virtue of the products and services involved. However the evidence suggests that such activities are fairly widespread and consumers continue to have difficulty in obtaining redress.

## **6.2. Restorative Justice – Issues**

The preliminary evidence that we received in the early stages of this research indicated general agreement that some means of repairing the harm caused to consumers by trading or business practices is desirable. Understanding of exactly what restorative justice is varies among enforcers, regulators and consumer groups with knowledge of the principle of victim-offender dialogue and compensation shown by respondents. But restorative remedies for complaints need not consist solely of compensation and can involve other means of making reparation. In our interviews we explored the extent to which enforcers and regulators might consider remedies other than compensation and which truly reflect the harm caused to consumers. However the evidence indicates that:

- Enforcers and regulators have concerns about having to take action to obtain redress for the consumer and effectively becoming 'judge, jury and executioner';
- Enforcers and regulators consider that the purpose of their enforcement action is to secure compliance with legislation rather than to punish business for causing harm to consumers. In particular, enforcers consider that it is not their role to obtain compensation for consumers and so even with the new powers introduced by the *Regulatory Enforcement and Sanctions Act 2008* restorative justice remedies for consumer complaints might not be pursued as enforcers/regulators do not consider that this is their role;
- Some trading standards officers have indicated that they consider that restorative justice would be more suitable for 'low level' non-criminal offences and should not be used across the board in consumer cases; and
- Enforcers consider that any restorative penalties should be subject to criminal rather than civil enforcement. The reason given for this is the difficulty in

enforcing civil sanctions, with enforcers and regulators indicating that the payment of civil penalties and compliance with court judgements is relatively low and that little attention is paid to ensuring that traders and businesses convicted at court and required to provide redress actually do so. Enforcers indicate that because of this they would be reluctant to use any new powers (other than fixed penalty fines) unless there was a clear process in place for ensuring that any remedies are carried out. Enforcers indicate that they would not wish to take on this responsibility and would not have the resources to do so.

We tested these issues with some 40 delegates during BERR's restorative justice workshop at the Trading Standards Institute conference in Bournemouth on 26 June 2008. The results broadly supported the views expressed in the preliminary evidence that we had received with most delegates indicating that they held the same views. This is discussed further below.

### **6.3. Representative Actions – Issues**

The evidence of this research indicates a clear need for representative actions to achieve consumer redress. Trading Standards officers confirm to us that even where they take successful enforcement action, consumers do not receive redress partly because the focus of their enforcement action is not to obtain compensation for the consumer (see above) but also because even at the conclusion of a successful criminal prosecution or other enforcement action it still requires the consumer to take civil action in order to get their money back or to receive redress. But respondents and our own research indicates that there are difficulties with pursuing representative actions. In particular our research has identified that:

- Enforcers and regulators do not wish to take responsibility for taking representative action cases on behalf of consumers and there is a general reluctance to apply for powers to do so. Enforcers and regulators would also be opposed to these powers being imposed on them and have concerns that cases that might achieve easy redress could result in unrealistic expectations on the part of consumers that regulators and enforcers can routinely achieve redress;
- Consumer groups would have difficulties in pursuing representative action cases. In general they lack the specialist in-house legal expertise to do so

and so would need to employ external legal expertise to do so. Consumer groups indicate that they may have difficulty accepting the liability for such cases under the current costs regime and so consider that there may need to be some change to the costs regime or may need to obtain some form of cost protection insurance. Consumer groups have also indicated that they may lack the resources to fund cases from the outset and so may have to employ lawyers as is the case with 'class actions' in the US;

- There is a perception that there would be difficulties in pursuing representative actions in cases where traders are based overseas, simply disappear to avoid enforcement action and litigation or in those cases involving multiple small amounts of money (i.e. a large number of consumers suffering a small amount of financial loss or detriment) where the trader would not realistically be able to pay any compensation or costs; and
- Knowledge of their rights by consumers may hamper the level of opt-in to cases and so mechanisms to ensure either that consumers are actively sought out to join in a representative action or to provide for redress for other consumers similarly affected in the event of a successful case are essential.

These issues were explored further during the focus group exercise and in field research (interviews and further documentary evidence gathering) for this research.

#### **6.4. Focus Group Exercise - Thursday 26 June 2008**

Approximately 40 people attended the restorative justice workshop at the TSI conference on 26 June 2008. Preliminary issues raised during the research were discussed with the delegates and were discussed as the following questions:

1. Concerns have been raised about enforcers having to take action to obtain redress for the consumer and effectively becoming 'judge, jury and executioner'. Do you agree with and share this concern?
2. Respondents have indicated that the purpose of enforcement action is to secure compliance rather than punish business or achieve redress for consumers. Do you agree with this view?
3. Respondents have indicated that Restorative Justice is more suitable for 'low level', non criminal offences. Do you agree with this view?
4. Should penalties for consumer offences be subject to civil or criminal enforcement?

Each question was asked of all delegates and a head count taken of the responses. The results were as follows:

1. **Enforcer concerns** – the majority of respondents (approx 75%) agreed with this proposition and confirmed that trading standards officers have concerns about being investigators, enforcers and adjudicators.
2. **Compliance** – around 60% of those present agreed that this was the case and that the purpose of enforcement was to secure compliance and not to achieve redress for consumers.
3. **Suitability of restorative justice** – opinion was divided on this question but with around 18 delegates disagreeing that this was the case and around 7 agreeing that this was the case. A number of delegates did not express an opinion.
4. **Civil vs. Criminal** – the response to this question was overwhelmingly (90% or higher) in favour of criminal enforcement of any penalties introduced by the *Regulatory Enforcement and Sanctions Bill* [and now contained within the Act] or introduced as part of any specific moves to introduce restorative justice as part of any new post-Hampton/Macrory enforcement regime.

## 6.5. Discussion/Analysis of the Results

The results of the focus group exercise were broadly in line with the views expressed in the preliminary research responses and the reasons for this are discussed in more detail below.

It is not surprising that trading standards' officers might believe that any changes which introduce restorative justice into consumer protection cases might turn them into judge, jury, and executioner and might wish to resist this. As enforcers, the primary role that trading standards officers occupy is one of investigating breaches of legislation, identifying the offender and determining whether the evidence is sufficient to lead to a successful prosecution and then to consider whether the circumstances of the case, the nature of the offense/offender and the impact on the victim justify a prosecution. Trading standards officers interviewed in this research indicate to us that the purpose of enforcement action is to achieve compliance with legislation and not to achieve redress for the consumer. So the introduction of additional penalties and imposing on trading standards officers the power to determine what the appropriate penalty should be represents a change in the focus of their work which

could impact on their relationships with business, particularly where they are acting in an advisory capacity. Changing trading standards from enforcers with an advisory capacity to enforcers and adjudicators could cause business' to see trading standards as a regulator with powers to impact negatively on their business and this could impact on the nature of any negotiation that takes place between business' and trading standards.

The response to the question on restorative justice perhaps reflects the level of knowledge of what restorative justice is and the different types of cases that may exist within trading standards areas. During the presentation we asked delegates whether they were familiar with the concept of restorative justice and what it means; just over half the delegates responded that they were aware of restorative justice. This indicates that there may be some misunderstanding about what the penalties in the *Regulatory Enforcement and Sanctions Bill* are intended to achieve and how they should be implemented<sup>81</sup>. There may also be some difference in how enforcers in different parts of the country will implement any restorative provisions and whether these might be subject to local schemes. As the majority of 'voting' delegates disagreed with the proposition the issue of whether enforcers consider that restorative justice is a measure better suited to larger scale and more criminal offences is one considered in our assessment of case models but should be explored further. This could reflect the fact that restorative justice is already spoken of as being a primarily criminal justice issue and so enforcers cannot easily see how it can be applied to non-criminal settings. This issue is covered in our analysis of restorative justice (Section 5 of this report) and in our consideration of case models and was also discussed with enforcers and regulators during interviews for this research.

It is entirely unsurprising that trading standards officers would consider that any penalties introduced by the *Regulatory Enforcement and Sanctions Act 2008* should be enforced by criminal rather than civil sanctions. In its guidance on the *Enterprise Act 2002* the OFT commented that although consumers benefit from the stronger protection and enforcement regime provided by the legislation "consumers who have a dispute will still need to seek redress through a court or an alternative means of dispute resolution."<sup>82</sup> In our preliminary discussions with trading standards officers

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<sup>81</sup> At the time of the Focus Group exercise the Bill had not yet received Royal Assent

<sup>82</sup> Enforcement of Consumer Protection Legislation: Guidance on Part 8 of the Enterprise Act, Office of Fair Trading, June 2003

and in the consultation responses that we received in the early stages of this research, officers expressed concern that there may be difficulties in ensuring that any penalties imposed by the courts are actually complied with. Officers indicated that the civil enforcement regime is ineffectual and that insufficient resources are allocated to ensuring that fines are paid and/or other remedies are delivered. Trading Standards and Regulators do not wish to become involved in pursuing the implementation or enforcement of civil remedies and do not consider that the civil justice regime is equal to this task. They consider, therefore, that only through criminal enforcement can the implementation of remedies for aggrieved consumers be achieved.

#### **6.6. Conclusions from the focus group**

The focus group exercise was useful in confirming that some of the views raised in the initial research are widely held by enforcers from different parts of the country, there are a number of concerns common to trading standards officers, and a largely shared view of their enforcement and compliance role and how any penalties should be enforced. However, the exercise also demonstrated that there are some areas where officers may not be entirely in agreement and this illustrates the difficulty of attempting to introduce one enforcement regime with common powers where officers may have differing views about how and where those powers will be used in practice.



## **7. USE OF EXISTING COMPENSATION OPTIONS**

### **7.1. Overview**

One issue raised during our interviews for this research was whether there was a need for any new measures to achieve redress for consumers. As mentioned elsewhere in this report (see Section 6) even where enforcement action is successfully taken, redress for the consumer may not be achieved. The report on consultation responses on representative actions noted that “in general, business representatives were opposed to the proposals. They cited lack of evidence of need for representative actions and raised concerns that they could be the first step towards American style class actions and a much more litigious culture.”<sup>83</sup> In interview, business representatives also confirmed that they were not persuaded that there was a need for any additional measures and observed that existing options to resolve disputes and provide redress were not being used effectively. Trading standards officers, however, have indicated that this is due to unwillingness on the part of the courts to provide for consumer redress in criminal cases seeing this as an issue for the civil courts to determine. As any (perceived) flaws in existing legislation could impact on the effectiveness of new legislation we have considered this issue as part of the research.

### **7.2. Provision of Consumer Redress by the Criminal Courts**

The main provision available to the courts is that of providing compensation for the consumer. While this may not always achieve the restorative justice aim of repairing the harm caused to the consumer it is a significant power whose use could resolve many complaints where the loss to the consumer is mainly financial.

The opportunity for courts to make compensation orders was originally contained in Section 35 of the *Criminal Courts Act 1973* (as amended<sup>84</sup> which provides a power for the courts to make a compensation order. Under the *Powers of Criminal Courts (Sentencing) Act 2000* a court, when sentencing, may make an order for the offender

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<sup>83</sup> BERR 'Representative Actions in Consumer Protection Legislation: Responses to the Government Consultation', March 2008

<sup>84</sup> The Act was repealed by the *Powers of Criminal Courts (Sentencing) Act 2000* which contains similar compensation provisions.

to pay compensation to the victim for any personal injury, loss or damage resulting from the offence. The payment of compensation should take precedence over the imposition of a fine if the offender cannot afford both, and the court is required to give reasons if they do not issue a compensation order in any case where it has the power to do so. As the compensation order can be made in respect of any personal injury, loss or damage the provision provides scope for the courts to award compensation in consumer cases where tangible damage or loss to the consumer has occurred. This could include, for example, those cases where a consumer has incurred excessive costs in a transaction with business, where a fraudulent business practice has resulted in loss or damage to the consumer (for example where damaged or faulty goods have been supplied to a consumer) or where as a result of the sale of goods or services the consumer has suffered further loss or damage. Theoretically, this provision would allow for compensation to be ordered where enforcement action is taken against a supplier of goods or services whose poor workmanship or substandard goods and lack of willingness to offer restitution cause the consumer to incur additional expense in rectifying the problem. However, section 130(4) of the Act says that the amount of compensation should be determined by the court with regard to any evidence or representations made by or on behalf of the accused or the prosecutor and the evidence of this research is that such compensation orders are rarely imposed. The reasons for this are discussed in more detail below.

### **7.3. Assessing Compensation Awards**

While the victim does not have to apply to the court before a compensation order can be made, in practice the prosecution would need to do so in order for the courts to consider evidence of the loss or damage suffered by the victim. This potentially is a significant barrier to consumers receiving compensation as the evidence of this research is that enforcers and regulators do not seek to achieve redress for consumers through their enforcement activity and so may not put evidence of the loss suffered by consumers before the courts. There is no absolute requirement on the prosecution to make a formal request for a compensation order before the courts can consider making such an order, but in practice the requirements to consider the available evidence and to determine the level of loss or damage before making a compensation order means that the prosecution will need to do this. The court of appeal in *R v Vivian [1978]* held that a compensation order could not be made unless the sum claimed is either agreed or simply proved. The courts do have some

discretion, where information is incomplete to make an assessment of the quantum to be awarded, however if the claim is challenged the court must hear evidence to determine liability see *R v Horsham Justices, ex parte Richards* [1985] 2 All E R 1114. As a result, cases where there is a dispute concerning the exact amount of loss to the consumer could result in the courts embarking on complicated investigations to determine the exact nature of the loss to the consumer. The evidence of some Trading Standards officers is that the courts are unwilling to take this action, instead leaving victims to their civil remedies. However courts can be asked to adjourn the proceedings so that evidence can be called in support of a claim although it would be for the prosecution to do this.

#### **7.4. Issues in seeking redress for consumers**

The Crown Prosecution Service's guidelines states that generally an application for compensation for damage or loss should only be made where "suitable documentary or other evidence is available."<sup>85</sup> This (and the case law referred to above) potentially places the burden on enforcers and prosecutors to collect evidence concerning the alleged loss or damage. Enforcers and prosecutors may also need to have sufficient evidence to combat any disputes or challenges to the claimed loss or damage raised by defendants in any proceedings. The preliminary evidence that we have obtained on this issue suggests that trading standards officers and regulators do not routinely request compensation orders as part of their enforcement and prosecutions activity. While this is an area on which further research is needed, previous research by the Home Office and the comments of trading standards officers and others indicates the issues that limit the use of compensation orders.

The Home Office conducted research into sentencing in the mid-1990's<sup>86</sup> which included an assessment of the use of compensation orders. While the research was not specifically into consumer protection cases it indicates some of the reasons why compensation orders are not awarded. The Home Office report comments on previous research (Moxon, Corkery and Hederman 1992) which concluded that while courts can make a compensation order (whether or not it is raised in the hearing) sentencers were often reluctant to do so in the absence of any evidence that the victim was seeking compensation. The defendant's inability to pay compensation

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<sup>85</sup> <http://www.cps.gov.uk/legal/index.html>

<sup>86</sup> Flood-Page, C., and Mackie, A., (1998) 'Sentencing practice: an examination of decisions in magistrates' courts and the Crown Court in the mid-1990's', London: Home Office

and the lack of information that would allow the court to assess how much compensation would be appropriate were also factors. Two quotes from magistrates included in the Home Office report starkly indicate this problem and are worth repeating here:

“How many times have you sat in a court and the defence has objected to a value in a charge and the CPS has said, ‘Can we amend that to ‘value unknown’? The minute they do that, that takes out the compensation.”

“I can think of at least one occasion where I refused compensation, or at least not to the amount that was claimed, because there was no real evidence. The estimate that was before us seemed to be one of these that a mate had written for him, so I refused to accept it.”<sup>87</sup>

The latter quote highlights a problem raised by some trading standards officers during this research. Identifying the extent of harm caused to consumers sometimes requires additional investigation and represents a very different investigation from simply establishing a breach of regulations and seeking the co-operation of the consumer in providing evidence of the offence. Instead it places the investigator in the position of assessing the level of loss, harm and damage caused to a consumer which sometimes involves the use of additional experts to evaluate the ‘value’ of the consumer detriment and to prepare evidence of this for subsequent court proceedings. Courts may not accept unsubstantiated evidence and the increased costs of providing sufficient evidence to convince a court could be prohibitive in some circumstances. An example provided by one trading standards officer related to the sale of cars. In the case of an obviously unroadworthy car it may be relatively easy to persuade a court to refund the purchase price to the consumer. However, in a case where there was a dispute about the value of a car, while trading standards officers relied on Glass’s Car Values (the industry standard car valuation guide) the defendant disputed the accuracy of the valuation and thus contested the amount of detriment claimed by the consumer. As Glass’s does not have statutory footing the court is not obliged to accept this valuation and so independent experts may need to be employed. This represents an additional cost for the prosecution.

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<sup>87</sup> Flood-Page, C., and Mackie, A., (1998) ‘Sentencing practice: an examination of decisions in magistrates’ courts and the Crown Court in the mid-1990’s’, London: Home Office

There is also a perception that the criminal courts may view consumer compensation as a matter for the civil courts. The Home Office report notes that it is open to victims to pursue compensation through the civil courts and some trading standards officers with whom we discussed this issue expressed the view that the courts may be unwilling to deal with civil compensation in their cases as they felt it was the role of the civil courts to assess such claims. The Home Office report noted this possibility with the following quote from a magistrate:

“The victim has a right to civil action and I contend myself that, if he has won in this court, that will stand him in good stead in the county court. That court may be better trained to deal with it.”

(Flood-Page and Mackie 1998:64)

While this quote should be seen in the context of the sentencing under consideration in the Home Office review, the impression remains that this is the view of the criminal courts when considering criminal enforcement in consumer cases.

## **7.5. Summary**

The use of existing compensation options is a peripheral issue for this research but is outlined here as an indicator for further research into this issue. Our preliminary evidence suggests that enforcers do not routinely ask for compensation orders to be issued even where this option is available to them and this will impact on the courts' decisions on whether an order is issued. The apparent failure to request compensation may reflect enforcers' views that it is not their role to obtain redress for the consumer but also reflects the additional evidence and expense required to bring a claim for compensation before the courts and to refute any challenges to the claimed losses. TSOs may be unwilling to incur and risk these additional costs. There may also be a perception by the courts that compensation claims in consumer cases are a civil issue. However, our provisional findings in this area are based on a preliminary investigation of the issue and we would recommend that further research is carried out into the extent to which compensation orders are requested and granted in consumer protection cases in order to fully assess the existing difficulties in this area. It should also be noted that compensation orders, while addressing the financial harm caused to individual consumers may not fully satisfy consumers that the harm cannot recur or that there will be a change in business practices.

## 8. CASE STUDIES

This research has identified that there are a significant number of consumer complaints where consumers do not receive effective redress even in the event of successful enforcement action. The flexible range of enforcement sanctions introduced under the *Regulatory Enforcement and Sanctions Act 2008* might go some way to providing for more effective redress for consumers. But, enforcers and regulators have indicated that they do not see it as their role to obtain redress for consumers and that generally enforcement action even where resulting in a successful prosecution and conviction for consumer offences does not result in consumers receiving redress.

The interviews and evidence that we have collated for this research have identified a large number of cases where consumers are unlikely to receive redress. The case examples provided during interview cover a range of different types of consumer protection cases and different business practices and highlight some practical difficulties in achieving consumer redress even if additional enforcement powers are employed. Our analysis of legislation and the case examples provided to us by enforcers and regulators together with our analysis of the literature on representative actions and restorative justice has allowed us to develop some case models that illustrate the difficulties of implementing these measures.

### **A**

Sale of cars with a built in 3 year warranty (from insurer A). Conditions are such that in practice the warranty can never be relied on. A tranche of goods have been sold and delivered within the last 3 months. Another insurer will give a reliable warranty for the balance of the years for £y. per month

Assuming the facts are as stated the case would seem to be suitable for collective action as the total quantum of the claim can simply be stated as number of consumers x £y x (36 – aggregate number of months outstanding) + interest and in turn this readily divided to compensate each individual.

*In principle this would be of interest to a lawyer prepared to take the case on a CFA basis assuming that ATE cover can be obtained and the defendant is solvent which as insurer they should be. Issues of quantum should be simple.*

*The case is also one that could be suitable for restorative justice by way of the trader being required to provide a remedy for affected consumers. The trader could be required to provide an effective warranty for all consumers that will allow them to have any required repairs completed under the warranty and throughout the full 3 year term. The trader would also be required to make good on any repairs that are required and/or to refund the cost of any repairs that have been carried out elsewhere. Alternatively the trader (or insurer A) could be required to meet the costs of the warranty that will be provided by the other insurer.*

Case A illustrates a relatively straightforward case where consumers have suffered similar detriment which could be easily assessed. However, one issue highlighted during interviews is the difficulty of remedying cases where the detriment caused to consumers varies and where different faults require different remedies. This is potentially a difficult issue for enforcers should they be dealing with a number of complaints about the same trader where it could require detailed investigation of the harm caused to each consumer in order that the appropriate remedy can be determined. Case B illustrates an example case of different harm being caused to consumers.

## **B**

Sale of kitchen units with fitting included in the price. Kitchens do not match description; contractors are incompetent; units do not fit together even with competent fitting. Each customer would have a different case with different characteristics: price; problems with fitting; cost of remedial work; cost of delay if kitchen fitting associated with building work.

*In principle a case that would be suitable for a collective (representative) action but the different harm caused to consumers might make this less attractive for a lawyer to pursue.*

*The case could be one that a representative body (i.e. a consumer group) might*

*pursue in order to establish an issue of concern to a group of consumers (i.e. poor service within the kitchen fitting and supply industry and the lack of redress for consumers when things go wrong.)*

*The case could potentially be resolved through Restorative Justice although this could present difficulties for an enforcer. The involvement of both the original supplier and a fitting contractor could mean that enforcement action may need to be taken against two bodies; clarification of this issue, the harms caused to each consumer and the required remedy for consumers may require detailed investigation by the enforcer/regulator before appropriate remedies could be identified. (Although the nature of the contract between purchaser and consumer may be sufficient that enforcement action solely against the original seller is sufficient.) A restorative remedy for the complaint could require the supplier to make good on all the problems with the aim of putting the consumer back in the position that they would have been in had the errors not occurred. This would be difficult where goods do not match the description and so financial compensation and/or replacement of the kitchen with appropriate replacement goods (e.g. of the same value as that originally ordered) may be the only possible remedy. Where goods have not been fitted correctly the seller should meet the costs of remedial fitting and replacement of faulty components. Where the consumer has suffered additional costs/delay as a result of the errors, financial compensation would be appropriate.*

Case B illustrates the difficulties where a large number of consumers have been affected by the actions of the same trader but where enforcement action could still lead to consumers having to take individual (civil) cases against the trader in order to achieve redress. The legal costs involved for a consumer group should it choose to pursue this issue make it unlikely that it would do so although it may be an issue where legal action might highlight the issue and where action by a regulator could resolve matters for the consumer. The OFT in its response to this research commented that:

"In cases affecting a large number of consumers, the regulator may need to act representatively on behalf of consumers (this may require legislative changes to allow OFT to do that), although it could be that in some cases a representative group of affected consumers could also meet with the trader



and regulator in order to agree what actions could be undertaken by the trader”

This may not be desirable in all cases and our review of the consultation responses on representative actions and the evidence of our interviews is that business may have concerns about interest groups being formed solely to bring collective actions and pursue a particular issue. But the OFT suggests that the involvement of a regulator to pursue a representative action could be pursued where consumers have already grouped themselves together, for example as a pressure group fighting unfair pricing or environmentally damaging practices or consumers who have all bought the same package holiday. This is not unheard of in ADR and dispute resolution, the Local Government Ombudsman, for example, while mainly considering complaints made by individuals also considers cases where a number of affected residents bring similar complaints that might be considered via one investigation that establishes the facts of the issue and then considers the appropriate remedy to reflect the harm caused to each resident. A new collective action regime was also introduced in Denmark which came into force in January 2008. The Danish rules allow for both an opt-in and opt-out model although cases brought using the opt-out model can only be brought by the Consumer Ombudsman as the representative of the group.<sup>88</sup>

There is, of course, a distinction to be made between the problems inadvertently caused by legitimate business and consumer problems caused by rogue traders. Where a legitimate business inadvertently breaches legislation and causes problems for consumers it may be willing to remedy the problems caused to consumers where this is brought to its attention. However, rogue traders have a different agenda as outlined in Case C.

**C**

Sale of counterfeit application software for home computers.

The dealer sells mail order and online and the goods are provided either as a cheap download or a CD in the mail (without full documentation). Once installed the software often fails to work effectively, is ineligible for any updates

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<sup>88</sup> Clifford Chance (2008) 'Class Actions make their way into Europe', London: Clifford Chance

or support that are available to purchasers of genuine software and in some cases the software causes damage to computers. Complaints to the seller are either not responded to or the seller simply asks the purchaser to send faulty disks back at their expense and replaces them with another (often faulty) CD. Refunds are not given and the seller takes no responsibility for any software conflicts or problems caused by the defective goods. Trading standards investigate the complaint and decide to take enforcement action.

*This case might be suitable for a representative action, but equally could be one for which restorative justice properly implemented by enforcers or regulators could achieve both redress for consumers and the enforcement of legislation. However, there may be concerns as to whether civil action is viable if the seller is not solvent or might go insolvent to avoid liability.*

Where the trader is not solvent or becomes so to avoid liability this would also impact on any attempt to have the trader or business implement a restorative penalty where one is imposed by the regulator. Business has highlighted to us that there are cases where business can voluntarily resolve matters for consumers using restorative practices and the provisions of the *Regulatory Enforcement and Sanctions Act 2008* seem to provide a mechanism for legitimate business to do so in consultation with enforcers.

#### D

Second-hand car trade – clocked cars - large number of consumers affected – enforcement action does not resolve all consumer issues.

A complaint from a member of the public leads trading standards to investigate a small independent local motor trader. Trading standards have the car that is the subject of the complaint tested and determined that its mileage has been altered. Subsequent investigations determine that around 100 cars have been ‘clocked’ by the dealer over a three year period, with varying amounts taken off the mileage of each car involved. Trading standards decide to take enforcement action against the trader.

*Under the ‘normal’ regime, enforcement action even if resulting in a conviction for the trader would most likely require the consumer to take civil action to*

*achieve redress. The case might be one that would be suitable for a representative action because there are a large number of consumers (100) who have been affected in a similar way, albeit the harm that they have suffered might differ between consumers. There may be some minor difficulties in identifying all affected consumers but a representative such as a consumer group could potentially identify all consumers who purchased cars from the trader during the three year period.*

*The different levels of detriment suffered by consumers would, however, mean that the case might not be of interest to a lawyer in a collective action. Dependent on the level of 'clocking', some consumers might have paid only a small amount more than they would have if the car's correct mileage had been shown while others may, in fact have paid a fair price for the car even though the car was 'clocked' to make the car seem more of a bargain than actually represented. A suitably designated consumer group might be interested in the case but would incur considerable legal fees in doing so and would have to bear liability for costs in the event of an unsuccessful action. While the case would in principle be attractive for a consumer group, in practice it is unlikely that one would pursue the case.*

*Restorative justice could represent a means for enforcement action to achieve consumer redress. Under the Regulatory Enforcement and Sanctions Act 2008 the trader could accept responsibility for identifying a resolution by way of an undertaking to enforcers. However in the event that the trader declines to do so an enforceable undertaking that requires the trader to compensate all those who have purchased cars from him for the amount of their loss or to provide some other remedy that addresses the harm would be a suitable remedy for the affected consumers.*

From our discussions with TSOs Case D would seem to be a fairly typical activity where a legitimate business (i.e. one that mostly operates lawfully but which has some practices which give rise to breaches of legislation) causes problems for consumers that are not resolved by enforcement action such as prosecution but where the new measures in the *Regulatory Enforcement and Sanctions Act 2008* could encourage the business to resolve the issue voluntarily (thus avoiding prosecution). During interview business representatives told us that there are numerous examples of where business already employs an element of restorative

principles voluntarily. For example in a case where chemicals enter a river and cause an environmental problem the business might recognise that it had been at fault and in addition to cleaning the river might restock it, effectively repairing the harm and returning the situation to what it would have been had the fault (i.e. the pollution) not occurred. Such a solution could be proposed by business by way of an undertaking under the *Regulatory Enforcement and Sanctions Act 2008*. However if a business is unwilling to provide a solution or repair the harm caused to consumers the enforcer/regulator could introduce a similar remedy as a penalty by way of using the discretionary enforcement provisions of the Act.

E

Furniture purchase – defective goods – trader and consumer cannot agree on remedy and trader disputes that goods are faulty – no customer service.

A consumer purchased a leather sofa from a trader. Within four months the consumer called the trader to report that the leather was peeling off and the stitching was coming undone. The trader agreed to repair the goods but the consumer refused, requesting a replacement. The trader sends a representative to assess the goods, who advises the consumer that the goods are indeed faulty. However the consumer then receives a letter from the trader stating that misuse of the goods caused the problems and so the sofa would not be replaced. After further complaints from the consumer, the trader again sends someone to assess the problem, who repeats the advice to the consumer that the leather was faulty, however the consumer again receives a letter from the trader stating the problem was misuse and wear and tear. The consumer continues to make complaints to the trader but does not receive any further response. The consumer makes a complaint to trading standards.

*The case is another one where Restorative justice could represent a means for enforcement action to achieve consumer redress. However, the unwillingness of the trader to respond to complaints and to recognise the problem (even when his own expert agrees that the product is faulty) makes it unlikely that the trader will willingly provide redress. Any restorative remedy should include measures to identify other consumers who have been similarly affected and to also provide them with an appropriate remedy.*

Example E demonstrates the difficulties experienced by consumers when a trader is unwilling to offer redress. While there is a distinction to be made between rogue traders intent on exploiting their customers and legitimate business who might experience some difficulty with their after sales care, consumers solely want redress when things go wrong. In the Example E scenario, it is likely that there are a number of consumers that have been similarly affected although they might not be easily identified from one-off complaints.

In cases where a number of consumers have been affected there is therefore a need for all affected consumers to receive redress according to the restorative principle of repairing the harm. It is this model employed by the ACCC in Australia (see Appendix 2) that illustrates how restorative practices could be employed using the provisions of the *Regulatory Enforcement and Sanctions Act 2008*. But this requires enforcers to engage with this aspect of the legislation and to actively employ restorative practices as part of their enforcement toolkit. Such measures are however, unlikely to be successful in cases where traders deliberately target vulnerable consumers (i.e. illegitimate business) or are based overseas and thus outside the reach of enforcement action under the Act as illustrated by Case F.

F

Online Scam – Internet sale of electrical goods – trader based overseas – defective and potentially dangerous goods – no sales support.

A trader based overseas sells small electrical goods (mostly kettles, toasters and microwaves) online in the UK via his own website and other online trading websites. The goods are sourced in the Eastern European country in which the dealer lives but are stored and despatched from a warehouse in the UK. Payment for the goods is made online via credit/debit card. Trading standards begin to receive complaints about the poor quality of the goods, goods being mis-described and the safety of some of the goods. Consumers also report that when complaints are made to the trader no response is received and consumers are simply left with the faulty goods. Testing reveals that some of the goods are dangerous but investigation confirms that the trader is based overseas and the UK based warehouse is simply a fulfilment house which stores and despatches the goods.

*This case would not be of interest to a lawyer as a group or representative action and it is also difficult to see how a consumer group would be able to progress it even though there could be a large number of affected consumers. The case would also be difficult to enforce under restorative justice principles even with the additional options in the Regulatory Enforcement and Sanctions Act 2008 because the trader is based overseas. While action might be taken to seize any defective goods from the UK location and to warn consumers of the dangers the unsafe goods represent, enforcement action against the trader would be problematic and it would also be difficult to enforce any judgment if the trader declined to make reparation or comply with any judgement.*

Scams represent a particular difficulty for achieving consumer redress although in its submission to this research the OFT surmised that this was one area where consumers “would benefit from an additional redress mechanism in the form of representative actions”. Research published by the OFT in 2006 revealed that UK consumers lose around £3.5 billion to scams every year, with an estimated 3.2 million adults falling victim to scams annually.<sup>89</sup>

This research further suggests that consumers lose around £1.2 billion every year to bogus holiday clubs, £490 million to high risk investment scams, £420 million to pyramid and get-rich-quick schemes, and £260 million to fake foreign lotteries.

The OFT considers that obtaining redress for scam victims may present particular challenges, such as identifying affected consumers and tracing scammers, as well as issues relating to the financial capacity of the scammer to repay victims. However, there is significant potential for a representative action mechanism to benefit victims of scams.

In addition to online scams a common activity among rogue traders who target vulnerable consumers is the demanding of money from consumers before orders will be completed or remedial action taken in the event of a fault. This is a theme that has emerged in our discussions with TSOs and has been considered in the development of case models based on scams or aggressive doorstep selling techniques. Case G illustrates the problem.

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<sup>89</sup> OFT ‘Research on impacts of mass marketed scams’ December 2006

## G

Driveway construction – faulty/incomplete installation – trader demands additional money from consumer – job either not completed or completed incompetently – complaints to trader ignored or company cannot be located.

A trader knocks on the door of a householder stating that he is in the area doing driveway and paving work and as a result has some materials left over and can offer a discount for other householders in the area. The trader quotes a 'special price' for the consumer contingent on them paying a deposit or the full amount of the job up front. The consumer pays a deposit and work is commenced but works are substandard. The consumer raises a complaint and the trader explains that he encountered a problem with the job and requires additional funds from the consumer to rectify this and will not complete the work until the consumer pays the (increased) balance. The consumer pays the balance under duress but the trader either fails to complete the job or completes it to a low standard which requires additional remedial works. Complaints left as messages to the trader's mobile telephone are ignored and after a month or so the number becomes unobtainable. The address given by the trader turns out to be a false one and the consumer has difficulty in locating the trader.

*This case would not be of interest to a lawyer as a group or representative action even though there are likely to be a number of consumers affected by what is most likely a way of operating the 'business' that causes regular harm to consumers. The business model is such that vulnerable consumers are deliberately targeted and so there is little prospect of a successful action resulting in any recompense to consumers. Even if court action can be initiated (and the difficulties of locating the trader make this unlikely) such civil action would not be viable if the trader were either insolvent or attempted to become so in order to avoid liability. The trader is likely to ignore any court judgement even if the judgement goes the consumer's way, making the case an unattractive option for a lawyer.*

*Similar problems exist in any attempt to pursue the case via restorative justice. Theoretically a restorative penalty could require the trader to remedy any defects in the original work and/or provide compensation for the additional costs*

*the consumer has incurred while also providing a remedy for other consumers who have been similarly affected. However, even if enforcers are able to locate the trader it is unlikely that he will voluntarily agree to a restorative penalty leaving enforcers with the option of prosecution.*

Finally, there are also problems where the actions of the consumer themselves are a factor in the failure to resolve a complaint (although this is not to suggest that the consumer is at fault). Case H illustrates an example where a trader offers compensation or a remedy to the customer but the customer refuses to accept the remedy and the relationship between the consumer and the trader subsequently breaks down.

#### **H**

Double Glazing – faulty/incomplete fitting – no sales or fitting support – no sales support.

Consumer ordered double glazing and door to be supplied and fitted. Consumer was told that she would not have to pay until completion but fitters demanded £2245 upfront, which the consumer paid and works commenced. The consumer subsequently reported that the fitter had supplied the wrong window, there was no frosted window in the bathroom as ordered and the surveying had been done incorrectly. When complaints were made to the trader he became abusive and told the consumer that if she continued complaining the job would not be completed and they would not fit the window and door. After much complaining the managing director of the company offered her £5 compensation for the window, the consumer refused this and informed the company she wanted the frosted window she had paid for. However the company sent a fitter to look at the window with £10 compensation for the consumer. She rejected this and maintained that she wanted the goods she had ordered.

The company failed to complete the job and did not reply to several complaint letters sent by recorded delivery. The consumer telephones Consumer Direct and subsequently refers the case to Trading Standards.



*In principle a case that would be of interest to a lawyer as a group or representative action as there are likely to be a number of consumers affected by the company's fitting practices where customers do not always receive the exact goods they have paid for. Issues of quantum should be relatively straightforward but where the bulk of the work has been carried out and the amount of detriment caused to consumers is relatively low in value the case may become less attractive.*

*Restorative justice undertaken by an enforcer could resolve the complaint. However, the company has offered the consumer compensation which they have refused and this may be an issue taken into account when determining the remedy. As the company has shown some willingness to provide a remedy (albeit a remedy that was considered by the consumer to be inadequate) an appropriate undertaking might be for the company to fit the goods that the consumer has paid for (the window and door) and to pay a small amount of compensation for the inconvenience caused to the consumer. The enforcer could also require the company to provide an undertaking to change its business practices and to consider other consumers in the same position.*

The OFT advises that a common theme amongst complaints about goods in the double glazing industry relates to defective goods or poor workmanship, followed by inadequate repairs or offers of redress. Several complaints involve the trader seeking additional payment above and beyond what the consumer agreed to pay.

### **Summary of Case Examples**

These cases highlight some of the difficulties of pursuing cases under collective actions and restorative justice while also highlighting some areas where cases could be pursued via these mechanisms.

Public enforcement is generally preferable to consumers having to pursue civil action to resolve complaints. If public enforcers are able to take effective action to resolve a complaint then consumers are spared the inconvenience, stress and expense of pursuing a civil action. Enforcement action by public enforcers can also have the effect of changing business behaviour and allow enforcers to work with business to achieve compliance with regulations. However, enforcers do not pursue all cases brought to their attention and make judgements about which cases they will pursue

taking into account such issues as the attitude of the offender, the nature of the breach, the availability of evidence and the resources needed to pursue a case. Because of this there remains a need to have in place mechanisms that allow consumers to pursue cases that public enforcers decide not to pursue if the consumer is to recover any loss or damage caused to them in cases where agreement cannot be reached with the business on the harm caused and the appropriate remedy for that harm.

However the case examples shown above outline the difficulties that exist where a business or trader is unwilling or unable to provide a remedy for a complaint; as a result it is difficult to easily determine the appropriate mechanism through which a case should be pursued. **Case A**, for example could be resolved either by a collective action or by a restorative remedy pursued by an enforcer. The advantages of the collective action in this case are that it is a relatively straightforward case which allows for a group of consumers to directly receive compensation and has the potential for other consumers who have been affected to be identified and join the action. **Case B** is a difficult one to pursue via a collective action as it would not be of interest to a lawyer and so despite the difficulties mentioned above would be one that could be pursued via a public enforcer pursuing a restorative justice remedy. However, such an investigation may require considerable resources and assessment of the harm caused to a range of consumers and carries with it a risk that a trader may be unwilling to provide the remedy. This is also an issue in cases **C**, **D** and **E** and the deliberately fraudulent nature of the trading activity in Cases **F** and **G** (the latter with its emphasis on targeting a vulnerable consumer) mean that public enforcement with its punitive element rather than solely an emphasis on achieving redress may be necessary. Case **H** which indicates a situation where a trader has attempted to find some means of resolving a complaint but the relationship between the trader and consumer has broken down shows how consumers expectations can be a factor in the breakdown of the relationship and may discourage traders from making redress. This is not to say that the consumer is at fault for insisting on a particular remedy but the challenge for enforcers attempting to implement a restorative remedy in such cases is to find a remedy that is acceptable to both parties. The evidence of this research is that it is this shift in becoming the final adjudicator on the dispute (referred to as the 'judge, jury and executioner') that is of concern to enforcers as well as the difficulty of what to do when the remedy is not complied with. We consider that court enforceable undertakings such as those used

by the ACCC would provide a solution to this difficulty as it would allow for enforcement of any remedy and provide a level of status to the remedies.

There are, of course, those traders running an illegitimate business who might not be deterred either by public enforcement or a collective action and from whom a remedy for consumers may be impossible to obtain. However even where the prospect of success may be slight against such traders action should still be pursued.

Consumers require confidence that fraudulent trading activity and/or business activity will not be ignored and that some mechanisms exists to attempt resolution of their complaint. It is also important that an enforcement record exists of those businesses that cause consumer detriment in the event of future activity.

Further case examples are contained in *Appendix 1: Consumer Protection Case Data from the OFT* and in *Appendix 2: Application of Enforceable Undertakings in Australia*.

## 9. CONCLUSIONS AND RECOMMENDATIONS

The evidence that we have received and analysed during this research project indicates that there is a gap between successful enforcement action and redress for consumers. If the intent is to provide for greater redress for consumers, introducing restorative justice, ADR and/or representative actions into consumer protection cases provides a mechanism through which this gap could be addressed. Trading standards officers, consumer representatives and the OFT agree that even where enforcement action is properly taken by enforcers or regulators and is successful, consumers are often still left without adequate redress and in the majority of cases will need to take civil action in order to obtain compensation or achieve some other forms of redress. This puts individual consumers (or an affected group of consumers) at the disadvantage of having to seek legal advice and to bear the costs of their own legal action.

While there is general agreement that representative actions could provide for more effective consumer redress enforcers and regulators indicate that they do not wish to take responsibility for pursuing these cases and identify practical difficulties in taking representative action cases even if a mechanism to make this option more widely available is introduced. In addition there are difficulties with consumer groups taking on representative action cases due to the lack of in-house legal expertise to bring such cases and the cost of obtaining outside legal expertise and the current costs regime for such cases. Business has concerns about the possibility of a class action style culture being introduced in the UK and the potential escalation of a 'compensation culture'. The issue of 'success fees' is also an issue and any mechanism introduced for representative actions should not introduce a system where fees drive consumer actions (e.g. lawyers should not be able to bring a £12,000 action for a £1,000 claim that could be addressed through other means).

However while restorative justice is seen by respondents as being a tool through which redress might be achieved for consumers, the initial evidence is that enforcers and regulators may be reluctant to use the new tools contained in the *Regulatory Enforcement and Sanctions Act 2008*, do not see it as their role to obtain redress for individual consumers and have concerns about becoming responsible for doing so. Business representatives have also raised concerns about the practical difficulties of

implementing restorative penalties and whether a restorative penalty would constitute a final settlement of a dispute (i.e. once business has agreed to a settlement and the adjudicator/regulator is satisfied the consumer should not then be able to pursue further action). The advice giving role that enforcers have is an important one and while the *Regulatory Enforcement and Sanctions Act 2008* provides scope for business to make an undertaking on how to resolve a dispute or for enforcers to employ restorative practices as an enforcement tool, this represents a shift in the role of enforcers that has resource implications and which enforcers may be unwilling to implement. There are also concerns about how any restorative measures can be enforced and implemented and the overwhelming view of enforcer/regulator respondents in this research was that these should be subject to criminal enforcement.

Any restorative practice employed as a solution to consumer protection cases should therefore be designed to achieve a final settlement of the complaint without the need for consumers to take civil action to achieve redress, although to be effective enforcers may need to retain criminal prosecution as an option if the attempt to resolve the dispute by restorative means fails and there are potential difficulties if a business or trader is unwilling or unable to carry out a remedy. The (court) enforceable undertakings model used by the ACCC is potentially an attractive one as it provides a mechanism for ensuring that undertakings are carried out and that the wider harm to consumers is addressed. But there are resource implications attached to employing such restorative practices and in the event that public enforcement fails to resolve the issue there still needs to be a mechanism through which consumers are able to take action. While public enforcement remains the preferred option there will inevitably be cases that public enforcers choose not to pursue and in these cases, consumers need some option that will allow them to pursue action where they have been caused detriment. We therefore envisage the need for a twin-track approach that provides for effective enforcement employing restorative justice principles using the additional powers provided for in the *Regulatory Enforcement and Sanctions Act 2008* and an improved facility to take collective actions in certain cases.

We therefore make the following recommendations:

1. That pilot restorative justice scheme(s) should be established to determine whether there would be increased costs, training needs or

other resource difficulties that would need to be addressed by TSOs or regulators in employing restorative practices to consumer cases using the provisions of the *Regulatory Enforcement and Sanctions Act 2008*. The evidence of this research is that there are practical difficulties in employing restorative practices and concerns among enforcers, regulators and business about how the measures would work in practice.

2. Consideration should be given to introducing an independent Consumer Ombudsman along the lines of the Nordic Ombudsmen who could consider representative actions and implement restorative justice to deliver effective and efficient enforcement, compensation and redress for consumers. Having such an independent, publicly funded adjudicator could result in a considerable saving on the cost of private collective actions, eliminate the concerns of regulators and consumer groups about the costs of these actions and also address the concerns of business about the changed enforcement regime. We accept that such a measure would require legislative change.
3. Even the least enthusiastic supporter of private enforcement through the civil courts recognises that there will be cases in which aggregated and co-ordinated action satisfies a cost benefit test.<sup>90</sup> The approach of co-ordination through a representative body would seem to meet the perceived requirement that the public interest should trump any entrepreneurial lawyer profit motive. However, this begs the questions who should be the representative body and can a more responsive system be devised to establish representative bodies in advance of need or as and when required within a reasonable time scale rather than the tortuous process under which the Consumer Association became a specified body for competition damage claims.<sup>91</sup> Consideration should be given to a two stage approach to this issue. Firstly, a model or models should be created to demonstrate the range of attributes that a satisfactory representative body, or consortium of registered bodies, should display to be able to carry out a cost benefit analysis on an aggregated consumer claim; to identify potential claimants and lawyers

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<sup>90</sup> C.Hodges 'Encouraging Enterprise and Rebalancing Risk: Implications of Economic Policy for Regulation, Enforcement and Compensation' [2007] EBLR pp1262-3.

<sup>91</sup> See paragraph 4.9 above.

and to manage the claim as the central client. This analysis would include governance issues as well as resources issues; including the use of *cy pres* techniques to transfer unallocated damages to the general interest, including the financial viability of the representative body.<sup>92</sup> Secondly, an audit should be carried out to identify existing organisations (including TSOs; consortia of TSOs; national and local consumer bodies; law centres etc) which satisfy the model(s) or by co-ordination, training or further resources might be able to satisfy the model(s) in future.

4. That further research is needed into the reasons why the existing options for awarding compensation available to the courts are underused. This is an issue cited by business and by TSOs suggesting that there is scope for courts to award compensation without the need for consumers to take civil action but the option is not being used. While we have outlined some of the reasons why existing options might not be used (see Section 7) our analysis is a preliminary one based on limited evidence and we consider that further research to assess the issue in detail is required.

While both restorative justice and representative actions may in theory provide a solution to the problem of consumer redress the evidence is that despite evidence of need there are a number of problems with introducing restorative justice and representative action measures and there are specific case models where problems may occur. The *Regulatory Enforcement and Sanctions Act 2008* goes some way to addressing the issue of restorative justice by making it possible for restorative practices to be employed by regulators along the lines of the (enforceable) undertakings used by the ACCC in Australia. If used effectively the new flexible penalties provide for a mechanism for business and enforcers to find creative solutions to consumer problems and for enforcement action to incorporate dialogue with business and consumers that will produce solutions that repair the harm caused to consumers.

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<sup>92</sup> This doctrine which originated in the courts of equity deals with the problem of when the object of a trust fail (A charity set up to benefit a school but the school closes down) and allows re-allocation to similar objectives. It has been widely and controversially used in the USA in consumer actions to benefit 'second level' consumers who may not have been individually subject to damage but share an interest in redress. For a general discussion in the context of the US debate see [http://www.fed-soc.org/doclib/20080404\\_FrankCAW7.1.pdf](http://www.fed-soc.org/doclib/20080404_FrankCAW7.1.pdf) and <http://www.antitrustinstitute.org/archives/files/454.pdf>

## **APPENDIX 1 – Consumer Protection Case Examples**

In its response to this research the OFT confirmed its view that representative actions would be beneficial to groups of consumers who have been unable, for whatever reason, to resolve their disputes through direct settlement or alternative dispute resolution mechanisms (ADR).

The OFT's Consumer Detriment Study<sup>93</sup> found an estimated 34 per cent of consumer problems are considered not resolved at all by the consumer, and in around 19 per cent of cases, consumers who considered their problem resolved were not satisfied with the outcome.<sup>94</sup>

An analysis of the consumer direct database carried out by the OFT identified a number of areas within which case examples that could benefit from representative action could be found. The OFT's table of these cases is reproduced below as part of this report using data sourced from the Consumer Direct Database, specifically complaints recorded between 1 January 2007 and 31 December 2007.

The OFT has acknowledged the limitations of the Consumer Direct database which contains self-reported complaints that have been reported to Consumer Direct only. The examples should, therefore, be considered as an illustrative analysis rather than a rigorous economic study of the sectors chosen for examination. For example, the OFT cautions that not all market reports relate specifically to the same year that the complaints data has been taken from (2007), and there may be a range of factors that contribute to the number of complaints received about a certain trader which have not been explored for the purpose of this study.

However, the Consumer Direct database is a valuable resource of cases that give rise to complaints from consumers and provides access to useful case examples. This information combined with information provided by Trading Standards Officers and in the academic literature on collective redress and casework information produced by regulators helps to identify consumer issues where a representative action may be of benefit to consumers notwithstanding any concerns about the

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<sup>93</sup> OFT 'Consumer Detriment Study' April 2008

<sup>94</sup> OFT 'Consumer Detriment Study' April 2008, p50-53



effectiveness of such actions or whether better use of existing legislative provisions by the courts (for example a greater willingness to award compensation) might achieve the same results as introducing a representative action mechanism.

The OFT's data provides for a means of looking at cases by complaint type which suggests that it may make more sense to group cases by the actions of a trader rather than the specifics of each complaint.

Combined with supplementary sources, the database has enabled an illustration of a broad range of cases that could potentially benefit from a representative action mechanism.

**Table of relevant and likely areas within which to search for case examples that could benefit from representative action.**

<b>Complaint type</b>	<b>Service area</b>	<b>Purchase method</b>
<b>defective goods (01A)</b>	double glazing, leather furniture, upholstered furniture, TVs, DVDs, lap tops, washing machines, fridges and freezers, second hand cars purchased by independent dealers, toys, cameras, women's clothing, jewellery including repairs, watches including repairs, women's footwear, motorised scooters, buggies/prams/pushchairs	trader premises internet doorstep invited
<b>substandard services (02A)</b>	other general building work, fitted kitchen, central heating, roofing, plumbers and plumbing, fitted bathrooms, double glazing, conservatories,	trader premises doorstep invited telephone

<b>Complaint type</b>	<b>Service area</b>	<b>Purchase method</b>
	car repairs and servicing purchased at independent garages, car parking and clamping, dry cleaning and laundry, holiday package overseas, other holiday types, guest houses and B&Bs, internet service providers, health clubs and gyms, photography, estate agents, letting agents advertising agencies	
<b>breach of contract</b>	fitted kitchen, double glazing, upholstered furniture, leather furniture, TVs, Lap tops and notebooks, package holidays overseas	telephone internet
<b>safety</b>	toys	
<b>failure in delivery</b>	other personal goods and services, women's clothing	trader premises internet
<b>overcharging</b>	Plumber and plumbing, other general building work	doorstep invited
<b>bogus selling</b>	lotteries, prize draws, roofing, tarmacing and paving	unsolicited postal
<b>high pressure selling</b>	double glazing, holiday clubs	uninvited doorstep unsolicited telephone
<b>direct marketing to vulnerable groups</b>	lotteries, prize draws, roofing, double glazing, tarmacing and paving, burglar alarms	unsolicited postal doorstep uninvited

<b>Complaint type</b>	<b>Service area</b>	<b>Purchase method</b>
<b>verbal misrepresentation/ misdescription</b>	lotteries, prize draws, advertising agencies, second hand cars from independent dealers, package holidays overseas	
<b>advertising</b>	lotteries, prize draws, package holidays overseas	trader premises unsolicited postal internet
<b>other offers of inadequate redress</b>	upholstered furniture, package holidays overseas, leather furniture, fridges and freezers, washing machines, internet service providers, fitted kitchens	trader premises

Source: OFT

## **APPENDIX 2 – APPLICATION OF ENFORCEABLE UNDERTAKINGS IN AUSTRALIA**

A commonly cited example of restorative justice being applied to a business context and consumer cases is the use of court ‘enforceable undertakings’ by the Australian Competition and Consumer Commission (ACCC). The OFT supplied information on the ACCC’s use of enforceable undertakings and we had also researched this issue as part of our assessment of whether a model existed for how enforcers and/or regulators might implement restorative justice in consumer cases.

The broad objectives of resolutions via ‘enforceable undertakings’ are to achieve the cessation of the conduct, redress for parties adversely affected, implementation of compliance measures to prevent future breaches, and by means of publicity, an educative and deterrent effect in the wider community and/or industry.<sup>95</sup>

These objectives complement the principles underpinning restorative justice, which is one of the reasons that ‘enforceable undertakings’ have been used as an example of restorative justice in business regulation.<sup>96</sup> It is noted, however, that the ACCC does not explicitly label ‘enforceable undertakings’ as restorative justice, and while ‘enforceable undertakings’ are argued to be demonstrative of restorative justice when they are at their best<sup>97</sup> – they do not always necessarily demonstrate restorative justice. However as outlined in Section 5 of this report, restorative practices can be employed either wholly or in part and still achieve reparation for affected consumers.

### **Case examples**

The most common conducts giving rise to the enforceable undertaking in consumer protection cases included misleading, false or deceptive representations and non-compliance with safety or product standards. Cases similar in scope to cases dealt with by TSOs and regulators in the UK and where consumers suffer detriment.

Many of the objections to the implementation of restorative justice on grounds of the apparent difficulty in identifying and implementing appropriate remedies for consumers seem to have been overcome by the ACCC. It should be noted that there are differences in legislation between the UK and Australia and the jurisdiction of the ACCC differs from that of a body like the OFT. But the enforceable undertakings model employed by the ACCC would seem to provide a clear indication of how, if properly implemented by enforcers and regulators, restorative penalties can be implemented in consumer cases. The following is a selection of cases<sup>98</sup> for which an enforceable undertaking was accepted by the ACCC, illustrating the scope of applicability, content of the undertakings and public accountability of the agreements.

Enforceable undertakings are published online at [www.accc.gov.au](http://www.accc.gov.au) and also in the Commission’s Annual Reports.

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<sup>95</sup> ACCC guidance on the use of enforceable undertakings, page 3

<sup>96</sup> Parker, ‘Restorative Justice in Business Regulation?’; Macrory 2006.

<sup>97</sup> Parker, ‘Restorative Justice in Business Regulation?’

<sup>98</sup> Summarised from Annual Reports and ACCC public register of Enforceable Undertakings

Industry	Details	Conduct	Undertaking requirement
Debt collection	<b>Alliance Factoring Pty Ltd</b> 17 August 2005	Debt collection practices, involving undue harassment or coercion	<ul style="list-style-type: none"> <li>▪ To implement a trade practices compliance program;</li> <li>▪ To review internal procedures;</li> <li>▪ To undertake compliance audit;</li> <li>▪ To establish a recourse for debtors to lodge a dispute;</li> <li>▪ To sponsor an industry forum</li> </ul>
Retail (fruit juice)	<b>Tamarama Fresh Juices Australia Pty Ltd</b> 28 February 2006	Allegation of Misleading or deceptive labelling of certain of fresh juice products (an allegation disputed by the trader)	<ul style="list-style-type: none"> <li>▪ To attend trade practices training</li> </ul>
Debt collection	<b>Collection House Limited &amp; Lion Finance Pty Ltd</b> 1 February 2006	Misleading and deceptive debt collection conduct.	<ul style="list-style-type: none"> <li>▪ To offer ex gratia payments in aggregate totalling up to \$660 000 to a group of approximately 500 NSW debtors from whom it collected 'old debts' between 2001 and 2004</li> <li>▪ To establish and maintain a Register of Communications and provide a copy of the register to the ACCC</li> </ul>
Motor vehicle	<b>GM Holden Ltd</b> 11 April 2006	Misleading advertising concerning a motor vehicle promotion.	<ul style="list-style-type: none"> <li>▪ To write to each person who purchased a vehicle subject to the special discount offering them the opportunity to return the vehicle for a full refund;</li> <li>▪ To endeavour to comply with any industry standards developed by the ACCC that are generally adopted by the industry;</li> <li>▪ To make improvements to its trade practices compliance program</li> <li>▪ To engage an independent third party to review its trade practices compliance program</li> </ul>
Aviation	<b>Janue Pty Ltd</b> 14 October 2005	Misleading and false representations as to the trader's accreditation.	<ul style="list-style-type: none"> <li>▪ Not to make representations that the company has accreditation as an 'approved school' with the International Air Transport Association (IATA) unless it did in fact have such accreditation;</li> <li>▪ To write to all customers who believed they were completing IATA accredited courses and offer those customers a refund;</li> <li>▪ To strengthen the existing corporate trade practices compliance program</li> </ul>

Industry	Details	Conduct	Undertaking requirement
<b>Real estate</b>	<b>Manningham Real Estate Pty</b> 8 July 2005	Misleading conduct and false representations regarding the applicability of Goods and Service Tax (GST) to the sale of real estate	<ul style="list-style-type: none"> <li>▪ To refrain from making false or misleading representations to potential purchasers regarding the applicability of GST to the sale of real estate;</li> <li>▪ To offer refunds representing half of the GST liability that was collected amounting to \$24 175.</li> <li>▪ To strengthen the existing corporate trade practices compliance program</li> </ul>
<b>Footwear</b>	<b>Pegasus Investments &amp; Holdings Pty Ltd</b> 15 February 2006	False or misleading representations on a range of footwear.	<ul style="list-style-type: none"> <li>▪ Not supply and sell in Australia any footwear product that is labeled '100% Wool Lining' and/or 'Australian Merino Wool' where to the knowledge of Pegasus that representation is or may be false;</li> <li>▪ To offer consumers who were misled by the conduct a refund equal to the cost of the footwear purchased; publish a corrective notice;</li> <li>▪ To strengthen the existing corporate trade practices compliance program</li> </ul>
<b>Cosmetics</b>	<b>Priceline Pty Limited</b> 24 April 2006	Priceline Pty Limited sold a number of cosmetic product brands that did not comply with the Trade Practices (Consumer Product Information Standards) (Cosmetics) Regulations 1991	<ul style="list-style-type: none"> <li>▪ To implement and maintain in all of its stores a permanent fixture on cosmetic display units that has plastic pockets for the insertion of ingredient lists;</li> <li>▪ To appoint a Priceline cosmetic manager in each Priceline store who will be responsible for authorising all cosmetic purchases and systems of display where cosmetics are displayed outside main cosmetic display units;</li> <li>▪ To conduct a weekly check of the cosmetic display units; trade practices compliance program;</li> <li>▪ To implement an effective complaints handling system</li> </ul>
<b>E-commerce website software</b>	<b>StoresOnline International, Inc. and StoresOnline, Inc.</b> 9 May 2006	Misleading or deceptive conduct in relation to seminars promoting online web-based business opportunities	<ul style="list-style-type: none"> <li>▪ To offer refunds to affected customers;</li> <li>▪ Not to make false or misleading statements about its website packages nor make statements about the future performance of the packages without having reasonable grounds for so doing; give future customers a three-day 'cooling off' period;</li> <li>▪ contribute to the ACCC legal costs</li> </ul>

Industry	Details	Conduct	Undertaking requirement
<b>Complementary medicine</b>	<b>Aussia Australia Pty Ltd</b> 18 June 2007	Incorrect labelling of products, traditionally used in Chinese medicine.	<ul style="list-style-type: none"> <li>▪ To remove any misrepresentations from existing stock;</li> <li>▪ To inform resellers and purchasers of the incorrectly labelled products;</li> <li>▪ To review its advertising and promotional material to ensure that any representations comply with the Trade Practices Act;</li> <li>▪ To publish an article regarding country of origin claims in an appropriate Chinese publication</li> </ul>
<b>Retail (snack foods)</b>	<b>Uncle Tobys Foods Pty Limited</b> 12 September 2006	False or misleading advertising.	<ul style="list-style-type: none"> <li>▪ To publish an article for the food industry on the importance of accurate advertising,</li> <li>▪ To review and implement recommended changes to its trade practices law compliance program</li> </ul>
<b>Internet service provision</b>	<b>Optus Internet Pty Limited</b> <b>Excite@Home Australia Pty Ltd</b> 20 September 2000	Misleading advertising and contract terms.	<ul style="list-style-type: none"> <li>▪ Not advertise the service as including "unlimited downloads" or "unlimited access" and will remove all advertising material that incorporates references to "unlimited access" or "unlimited downloads";</li> <li>▪ To revise the Audio Use Policy (AUP);</li> <li>▪ To write to all customers who have been terminated and who have not been reconnected, confirming its position and offering a full refund of all moneys paid (including installation, monthly and termination fees);</li> <li>▪ To write to all current customers clarifying the AUP and allowing such customers 30 days to cancel their subscription if they wish; and</li> <li>▪ To write to all customers who have signed up for the service but have not yet been installed clarifying the AUP and refund their installation fees (if any) that have been paid if they wish to cancel their subscription.</li> </ul>

Enforceable Undertakings are published online at [www.accc.gov.au](http://www.accc.gov.au) and also in the Commission's Annual Reports.

### Appendix 3: Compensation Data

Section 7 of this report identifies the lack of use of existing compensation provisions and we make a recommendation that further research is needed in this area. Limited data on the amount of compensation paid in consumer cases has been provided by the OFT although further research into the number of compensation orders requested and made in consumer cases is required. The table below consists of data from the OFT register of convictions showing the number of **convictions** recorded under each individual piece of legislation against the **total amount of compensation** paid under that legislation from the period 1 November 2007 to 31 October 2008.

	<u>Total</u>	<u>Comp. in £</u>
Trade Marks Act 1994	480	12,414
Trade Descriptions Act 1968	288	106,652
Theft Act 1968	17	5,956
Road Traffic Act 1988	59	1,266
Licensing Act	5	128
Fraud Act 2006	22	9,415
Forgery & Counterfeit Act 1981	12	11,070
Food Safety Act 1990	5	75
Fair Trading Act 1972	12	750
European Community Act 1972	58	14,290
Criminal Attempts Act 1987	4	4,203
Consumer Protection Act 1987	120	4,128
Common Law	6	29,949
Business Names Act 1985	36	425
Children & Young Persons Act 1933	1	15
<b><u>Total</u></b>	<b><u>1,125</u></b>	<b><u>200,736</u></b>



# Appendix 4: Enforcer/Regulator Research Questionnaire

The research questionnaire sent to enforcers and regulators is reproduced below. The questionnaire was sent with a covering letter outlining the aims of the research and the reasons why it was being undertaken. (This reproduced version of the questionnaire has been reformatted to fit within the format of the research report)

## Trading Standards and other Enforcers.

This research is into the need for and mechanisms to achieve, satisfactory redress for groups of consumers who have suffered detriment. The subject of this questionnaire is to identify types and numbers of consumer cases suitable for restorative justice and Alternate Dispute Resolution (ADR). Please answer as many questions as possible and supply supporting information wherever possible.

### PART 1

Please provide details on the types and numbers of consumer cases reported and investigated per annum.

Question 1: On average how many consumer complaints are reported to your trading standards/enforcement office each year?

Comments

Question 2: On average how many monitoring or inspection visits does your trading standards/enforcement office conduct for consumer cases each year?

Comments

Question 3: On average how many cases does your trading standards/enforcement office deal with each year in each of the main categories listed below?

Category	Number of Cases per annum
Advice and Education	
Animal health and Welfare	
Weight and Measures	
Consumer Credit and Estate Agents	
Fair Trading	
Petroleum and Explosives	
Food Standards	
Underage Sales	
Other (please specify)	

Please provide any further information you are able to supply on the main types of cases dealt with and consumer protection issues involved.

Comments

**Question 4:** Has there been any increase in the number of complaints made by members of the public in any particular area of your work over the last five years? If so, please state which area has seen the increase and, if known, explain the reason for the increase?

Comments

**Question 5:** How many cases are dealt with by the different types of formal enforcement action each year? Please list the numbers against each category below.

	Caution
	Formal Warning
	Prosecution
	Enforcement Notice
	Seizure of goods
	Forfeiture of Goods
	Suspension on the supply of goods
	Other (please provide further details)

Comments

**Question 6:** For those cases that are not the subject of formal enforcement action what is the main reason why formal enforcement action is not taken? Please tick one box only.

<input type="checkbox"/>	Insufficient Evidence or no offence disclosed by investigation
<input type="checkbox"/>	Not in the public Interest
<input type="checkbox"/>	Undertaking given by trader or business
<input type="checkbox"/>	Advice or information given
<input type="checkbox"/>	Warning given
<input type="checkbox"/>	Attitude of the offender
<input type="checkbox"/>	Voluntary compliance achieved
<input type="checkbox"/>	Other (please provide further details)

Please provide any further details that may explain your answer

Comments

**Question 7:** What criteria are used by your office when determining that a case should not be pursued to prosecution but where a breach of consumer protection legislation can be proved? If possible please provide supporting evidence and details of any quantified costs or benefits that determine whether a case will be pursued.

Comments

## PART 2: Additional Enforcement Powers

The *Regulatory Enforcement and Sanctions Bill* proposes additional enforcement powers for consumer cases including the option to impose fixed penalties, require a cessation of business practices, and accept undertakings from traders and businesses. We should be grateful for your views on how these options might work.

Question 8: Where cases are not pursued through to formal enforcement action do you agree that the additional enforcement options contained in the *Regulatory Enforcement and Sanctions Bill* might lead to more cases being pursued using the new enforcement options? Please explain your reasons

Comments

Question 9: Does your office intend to use the full range of additional powers provided for in the *Regulatory Enforcement and Sanctions Bill*? If not, please state which if any of the additional powers you intend to use and explain any difficulties you perceive in using the new powers.

Comments

Question 10: For each of the new enforcement powers please indicate how likely it is that they will be used in your enforcement work.

Type of penalty	Frequently	Occasionally	Seldom	Rarely
Fixed financial penalty				
Cessation notice				
Undertaking				
Restoration Notice				
Compliance Notice				

Please give reasons for your answer and if possible provide examples that show the types of cases where the various remedies might be used.

Comments

Question 11: Do you agree that the level of any fixed penalties should be calculated to provide a deterrent effect or to reflect the time and trouble caused to the consumer? Please explain your reasons and provide any additional information you consider relevant to the level of fixed penalties.

Comments

### PART 3: Restorative Justice

There is a proposal to introduce 'restorative justice' in consumer protection cases. The principles of restorative justice are that rather than simple punishment of an offender by fines or custodial sentencing, the penalty should contain a restorative element that attempts to 'repair the harm' caused by an offence or business practice. In addition, restorative principles propose that as part of the remedy to a complaint the 'victim' should: receive an apology, be provided with an opportunity to meet with the offender and make them aware of the impact of their crime or business practice and that victims should be able to obtain answers from offenders. We should be grateful for your views on how restorative justice might work in the types of cases you deal with.

Question 12: Prior to receiving this questionnaire how familiar were you with the concept of restorative justice?

VERY FAMILIAR   FAIRLY FAMILIAR   NOT VERY   UNAWARE  
(please circle as appropriate)

Please give reasons for your answer.

Comments

Question 13: If the option to use restorative principles/justice is introduced for consumer cases do you consider that it will require any changes to the way that cases are investigated and enforcement decisions are taken by your office?

YES/NO\* please delete as appropriate.





Question 16: How might the restorative principle of ‘repairing harm’ best be applied to consumer cases? Please tick one box only.

<input type="checkbox"/>	Financial compensation for loss or damage
<input type="checkbox"/>	Compensation for time and trouble incurred by consumer
<input type="checkbox"/>	Replacement of faulty goods
<input type="checkbox"/>	Changes to business practices
<input type="checkbox"/>	Provision of goods or services not (or badly) supplied
<input type="checkbox"/>	Other (please specify)

Please give reasons for your answer.

Comments

Question 17: Please provide an example(s) of the type of case or consumer issue that might be suitable for the application of restorative principles.

Comments

**Question 18: Do you agree that consumers should be consulted about any restorative element applied to enforcement notices or recommended as remedies? If not, please explain your reasons.**

Comments

**Question 19: If appropriate legislation is enacted to introduce restorative justice in consumer cases do you foresee any practical difficulties in enforcing restorative penalties?**

**YES/NO\*** please delete as appropriate.

**Please give reasons for your answer.**

Comments

**Question 20: Do you have any other comments on the proposed enforcement provisions of the *Regulatory Enforcement and Sanctions Bill* or achieving better consumer redress?**

Comments

Thank you for letting us have your views. If you would also be interested in being interviewed for this research or would like the opportunity to provide any further information please tick the statement below and provide contact details.

**Please contact**

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.....

**concerning an interview**

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Please return your completed questionnaire to Angus Nurse by email at [anurse@lincoln.ac.uk](mailto:anurse@lincoln.ac.uk) or by post to him at Faculty of Business and Law, University of Lincoln, Brayford Pool, Lincoln, LN6 7TS

## Appendix 5: Consumer Representatives Research Questionnaire

The research questionnaire sent to consumer groups and representatives is reproduced below. The questionnaire was sent with a covering letter outlining the aims of the research and the reasons why it was being undertaken. (This reproduced version of the questionnaire has been reformatted to fit the format of this research report)

### Consumer Representatives and Representative Actions.

This research is into the need for and mechanisms to achieve, satisfactory compensation for groups of consumers who have suffered detriment. The subject of this questionnaire is to identify types of consumer cases suitable for group actions and how representative actions might work to achieve consumer redress. Please answer as many questions as possible and supply supporting information wherever possible.

#### PART 1

Please provide details on the types and average numbers of consumer cases reported to your organisation and pursued or investigated per annum.

Question 1: Please tick one box from the following list of options that best describes you. If you fall into more than one category please only tick your main category or the category that you feel best describes you:

<input type="checkbox"/>	Charity
<input type="checkbox"/>	Consumer Watchdog
<input type="checkbox"/>	Trade Union
<input type="checkbox"/>	Interest Group
<input type="checkbox"/>	Law Centre
<input type="checkbox"/>	Representative Organisation
<input type="checkbox"/>	Advice Agency
<input type="checkbox"/>	Other (e.g. consultant or private individual)

**Question 2: On average how many consumer complaints does your organisation receive each year?**

Comments

**Question 3: What is the main area of complaints or advocacy work for your organisation?**

Comments

**Question 4: On average how many consumer complaints/cases does your organisation pursue each year in each of the main categories listed below?**

<i>Category</i>	<i>Number of Cases per annum</i>
Advice and Education	
Animal health and Welfare	
Housing	
Consumer Credit and Estate Agents	
Fair Trading	
Petroleum and Explosives	
Food Standards	
Underage Sales	
Other (please specify)	

**Question 5: Has there been any increase in the number of complaints made by members of the public in any particular area of your work over the last five years? If so, please state which area(s) have seen the increase and, if known, explain the reason for the increase?**

Comments

## PART 2: Enforcement Action

The *Regulatory Enforcement and Sanctions Bill* proposes additional enforcement powers for consumer cases including the option to impose fixed penalties, require a cessation of business practices, and accept undertakings from traders and businesses. These undertakings and some forms of penalty notice contained in the Bill may require that remedies provided by businesses should contain a restorative element that attempts to ‘repair the harm’ caused by an offence or business practice. We should be grateful for your views on the effectiveness of current enforcement activity and the types of cases that are subject to formal enforcement action. We should also be grateful for any views you have on how the additional penalties might work to achieve consumer redress.

**Question 6:** Of the cases that you have pursued on consumers' behalf, on average how many cases result in formal enforcement action each year? Please list the numbers against each category below.

	<b>Caution</b>
	<b>Formal Warning</b>
	<b>Prosecution</b>
	<b>Enforcement Notice</b>
	<b>Seizure of goods</b>
	<b>Forfeiture of Goods</b>
	<b>Suspension on the supply of goods</b>
	<b>Other (please provide further details)</b>

Please provide any supporting information that you have on the reasons for the particular type of enforcement action being pursued.

Comments

*Please note the next question concerns cases that are not pursued.*

**Question 7: For those cases that do not result in formal enforcement action what are the main reasons provided to you by enforcers for why no further enforcement action is taken? Please tick a maximum of three and number your responses in order of priority (1 being the most common).**

	Insufficient Evidence or no offence disclosed by investigation
	Not in the public Interest
	Caution considered more appropriate
	Advice or information given instead
	Warning given
	Attitude of the offender
	Voluntary compliance achieved
	Other (please provide further details)

Please provide any further details that may explain your answer

Comments

**Question 8: When formal enforcement action is not taken how well do you think that consumers generally understand the reasons why a case is not being pursued?**

GENERALLY UNDERSTAND                      SOMETIMES UNDERSTAND  
 SELDOM UNDERSTAND                      RARELY UNDERSTAND  
*(please circle as appropriate)*

Please give reasons for your answer



Comments

**Question 9: Are the remedies currently being provided for consumers when bringing complaints adequate?**

**YES/NO\***please delete as appropriate.

**Question 10: If you answered 'YES' to question 9 please go on to question 11. If not, please provide reasons and any supporting evidence for your answer and explain what further remedies you believe would be appropriate.**

Comments



Comments

**Question 13:** If possible, please provide details of the likely number of cases (per year) that you might consider pursuing as representative actions for consumers. Please give reasons for your answer.

Comments

*Please go to Question 15.*

Question 14: If you would not consider bringing representative actions if the option were available please explain the reasons for your answer.

Comments	

**Question 15: Do you think that the option to bring representative action cases on behalf of named consumers would make it easier to obtain redress for the consumer?**

YES/NO\* please delete as appropriate.

If you answered 'NO', please state what additional provisions you think are necessary to make consumer redress easier and explain your reasons. If you answered 'YES' please give reasons for your answer.

Comments

## PART 4: Restorative Justice

There is a proposal to introduce 'restorative justice' in consumer protection cases. The principles of restorative justice are that rather than simple punishment of an offender by fines or custodial sentencing, the penalty should contain a restorative element that attempts to 'repair the harm' caused by an offence or business practice. In addition, restorative principles propose that as part of the remedy to a complaint the 'victim' should: receive an apology, be provided with an opportunity to meet with the offender and make them aware of the impact of their crime or business practice and that victims should be able to obtain answers from offenders. If restorative attempts are unsuccessful cases might still proceed to formal enforcement. We should be grateful for your views on how restorative justice might work in the types of cases you deal with.

## PART 4: Restorative Justice

There is a proposal to introduce 'restorative justice' in consumer protection cases. The principles of restorative justice are that rather than simple punishment of an offender by fines or custodial sentencing, the penalty should contain a restorative element that attempts to 'repair the harm' caused by an offence or business practice. In addition, restorative principles propose that as part of the remedy to a complaint the 'victim' should: receive an apology, be provided with an opportunity to meet with the offender and make them aware of the impact of their crime or business practice and that victims should be able to obtain answers from offenders. If restorative attempts are unsuccessful cases might still proceed to formal enforcement. We should be grateful for your views on how restorative justice might work in the types of cases you deal with.

**Question 16: Prior to receiving this questionnaire how familiar were you with the concept of restorative justice?**

VERY FAMILIAR FAIRLY FAMILIAR NOT VERY UNAWARE  
(please circle as appropriate)

**Question 17: Do you agree that consumers should have a say in the penalty imposed by regulators?**

YES/NO\* please delete as appropriate.

If you answered 'NO', please say how you think the regulators should determine the appropriate remedy for a complaint, and provide supporting evidence for your preference

Comments

Question 18: For the cases that consumers bring to your attention or that you pursue please tick one box to indicate the (value) range in terms of loss to consumers in which the majority of cases fall.

<input type="checkbox"/>	Less than £50
<input type="checkbox"/>	Less than £100
<input type="checkbox"/>	Less than £500
<input type="checkbox"/>	Less than £1000
<input type="checkbox"/>	Greater than £1000

Please give reasons and any supporting information that might explain your answer.

Comments

Question 19: Do you think that the additional enforcement tools available in the *Regulatory Enforcement and Sanctions Bill* should require enforcers to inform consumers of their provisional view of how to remedy a complaint?

If so, please state how you think this information should be provided by enforcers, and explain your reasons.

Comments

**Question 20: Do you agree that the restorative justice approach is suitable for consumer cases?**

**YES/NO\*** please delete as appropriate.

**If you answered 'NO', please state what difficulties you think the restorative justice approach might cause and explain your reasons.**

Comments

**Question 21: What is the likely impact on your organisation of the proposed Bill? Where possible, please provide supporting evidence including (possible) quantified costs and benefits relating to bringing representative actions, familiarisation and/or legal costs, costs of the increased work load, and the annual cost of taking representative actions (compared to the cost of bringing complaints under current Regulations).**

Comments

**Question 22: Do you agree that regulators should pursue remedies that try to put the consumer back into the position they would have been in had the fault/harm not occurred? Please explain the reasons for your answer and provide supporting evidence where possible.**

Comments



**Question 23:** Do you think that the proposals in the *Regulatory Enforcement and Sanctions Bill* will provide particular opportunities for redress in respect of race equality, disability equality, age equality or gender equality? If so, please state why, and provide supporting evidence of any disadvantage currently suffered by particular groups when pursuing complaints, if possible.

# Comments

**Question 24: Do you have any other comments on the proposed use of representative actions and restorative justice in consumer cases?**

Comments

Thank you for letting us have your views. If you would also be interested in being interviewed for this research or would like the opportunity to provide any further information please tick the statement below and supply your contact details.

Please contact

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concerning an interview



Please return your completed questionnaire to Angus Nurse at [anurse@lincoln.ac.uk](mailto:anurse@lincoln.ac.uk) or by post to him at Faculty of Business and Law, University of Lincoln, Brayford Pool, Lincoln, LN6 7TS